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TREATISE

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OF

Universal Jurisprudence.



BY

JOHN PENFORD THOMAS, ESQUIRE,

OF QUEEN'S COLLEGE, CAMBRIDGE,
FELLOW OF THE ROYAL SOCIETY OF LITERATURE, AND MEMBER OF THE
ROYAL ASIATIC SOCIETY.



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TO

THE KING'S MOST EXCELLENT
MAJESTY.

MOST AUGUST SOVEREIGN,

I SHOULD be but feebly sensible of the highly flattering condescension with which YOUR MAJESTY was most graciously pleased to patronise this undertaking, in its commencement, did I not, with more of gratitude than of confidence, present it to YOUR MAJESTY, in its improved form.

AMIDST the varied fatigues of this attempt to render the comprehensive and often-puzzling science of jurisprudence intelligible to all YOUR MAJESTY's subjects, it has been the constant object of my anxious ambition to merit

your royal sanction. Difficult as has been the task of condensing, with impartiality and precision, the principles of the noble but much-neglected science of which I treat, I look back, SIRE! with unmixed joy to lucubrations which are recompensed by the exalted honor of YOUR MAJESTY'S approval.

THE age of gold which early fable sketched, is realised in YOUR MAJESTY'S auspicious sway. Science, by rapid strides, is approaching towards that perfection, beyond which she is fated not to pass. The splendors of legislation and peace are, in YOUR MAJESTY'S magnanimous mind, far more estimable than the achievements even of YOUR victorious forces. YOUR MAJESTY has raised a splendid pyramid of peaceful glory, in the institution of a royal college of literature; which will transmit, to distant ages, the recollection of YOUR MAJESTY'S munificence.

THE splendor and extent of YOUR MAJESTY'S sway is shown in the fact, that the sun is never absent from YOUR MAJESTY'S dominions. When

it departs from this country, and from Gibraltar, Sierra Leone, the island of Ascension, and St. Helena, which are almost longitudinally parallel with us, it rises upon Newfoundland, continues its course over the Northern Isles, Labrador, and Canada—passes on, in its path of grandeur, from Lake Superior to the West Indian isles—travels to the immense island of New Holland—then sheds its glories upon Ceylon—and proceeds over the extensive empire of Hindûstan.

YOUR MAJESTY's first care is, not to scatter over the world the terrors of war, nor to acquire new territories, nor to set up the banner of the british lion in the extreme parts of the world; but to provide for the welfare of YOUR nation, to cultivate the practice of uprightness, justice, and virtue, throughout YOUR extensive dominions, and to render YOUR subjects great, good, and happy.

YOUR affectionate subjects, SIRE! will perceive, in my enumeration of kingly duties, a

faint outline of those imperial virtues which en-
dear YOUR MAJESTY to YOUR devoted people.

THAT the reign of KING GEORGE THE
FOURTH, which History will record as one conspi-
cuous for its dignity, and worthy of lasting imi-
tation, may long continue to shed blessings upon
the british nation, is the fervent wish of,

SIRE!

YOUR MAJESTY'S

Very loyal subject,

And most dutiful servant,

J. PENFORD THOMAS.

QUEEN'S COLLEGE, CAMBRIDGE;
Nov. 12th, 1828.

ADVERTISEMENT

TO THE SECOND EDITION.



THE highly-illustrious sanction with which the former edition of this work was honored, has encouraged the author to further exertions, in the pursuit of his plan. He takes this opportunity of acknowledging the condescending patronage of His Most Christian Majesty the King of France, with which he has been honored, since the publication of the former edition.

The author is now enabled to present the treatise to the public, with considerable additions, which he trusts will increase its utility. In this edition, the classification of the sections into minor numeral divisions, as betraying too much tedious anatomy, has been in most places rejected. The writer has added clearness to passages at all obscure, and has endeavored, with less success than he wishes, to render the style of the book more popular. In order to increase the general interest of the work, he has interspersed

many historical facts through the second book. Most of the notes before inserted have been omitted, on account of their apparent tediousness, and as unfairly raising prejudices against the originality of the book, to the credit of which, little or great as it may be, the author considers himself entitled. Where, however, the doctrines of celebrated writers are opposed, notice is generally taken of the fact, in the notes.

As the whole of the treatise has been revised and enlarged, with the greatest care, it is necessary to state only that sections upon many subjects essentially connected with the science of jurisprudence, have been added in this impression. To particularise them would be troublesome to the reader.

The encomiums most kindly bestowed upon this attempt, by a noble judge, whose distinguished legal accomplishments were long respected, not only in this quarter of the world, but in every part of it where international law is understood as a science, confirmed as they have been by the approbation of other eminent english judges, will be received as a sufficient authority for the publication of the present edition.

P R O Æ M.



THIS is an entirely novel attempt to condense the whole science of law into a small volume, and in a popular form. The very diffuse style wherein natural and national law, which immediately concern every human being, have been stated and discussed, has been a subject of continual observation. International law has been much neglected in this country, whilst continental writers have pursued its enquiries with a devotedness and a talent proportioned to its extensive usefulness. Necker had too much reason reproachfully to describe us as “*les Anglois sorties depuis long temps des écoles de la philosophie législative.*”

Lord Bacon, in his masterly view of the ad-

vance of learning, justly observes that the law-treatises, up to his day, were either too finely spun, or too much fettered with the positive prescriptions of countries—that their authors wrote too strictly, as lawyers or philosophers. The fault perhaps has not been wholly remedied since his time. Locke also, in his ‘reasonableness of christianity*,’ hints at this defect in legal literature. A book is still wanting which shall contain, in a moderate compass, and explain in a familiar mode, the whole groundwork of law upon every subject of ordinary occurrence amongst men.

There is little encouragement to the gentleman—there is almost as little to the student, to enter into a consideration of the entire science of jurisprudence, in the absence of some clear and simple guide to instruct him in those rudiments, without a sound knowledge and appreciation of which, he can never attain a masterly acquaintance with a branch of learning so complicated and interwoven as that of law. The evil has often been a subject of complaint. I felt its inconveniences so severely myself, in the early part of my professional studies, that I was determined, after surmounting the difficulties attending a general sur-

* Octavo, p. 265.

vey of political institutions, to endeavor, as well as my most diligent efforts would enable me, to remedy it. The attempt was one of great boldness. It was, I may without affectation acknowledge, attended with considerable difficulty. It seemed calculated to excite many prejudices, and to rouse much opposition, at least if it were not executed in a manner which I might well despair of attaining. And the more the task was proceeded with, the more the impediments which were calculated to interrupt its execution, were perceived. Perseverance however got the better of fear, and if the judgment of some great lawyers be entitled to respect, I have no reason to regret the labor which the effort has cost me.

I shall be pardoned for saying a few words upon the plan of the performance. As the object of the work was entirely new, the sectional outlines of it have necessarily been so too. My first care was to begin at the very substructure, and to build up regularly, until I had fixed the apex of the pyramid. Thus the work begins with the nature of God, and the grounds of our duty to him, and ends with the glory, dignity, and happiness of nations—objects which essentially depend upon the previous parts of the system laid down. It was my unceasing study to

work deduction out of deduction, so that the reader might by one truth be prepared for the one which succeeded. For this purpose, I felt myself obliged to avoid not only that circumlocution which is so distressing in books, but also that fondness for mere terms of art, which is inconsistent with an expansive view of science. I took care, at the heads of the different chapters, to define the words which formed the subject-matters of them, with a strictness of attention suited to the importance of definitions in a volume of this kind. One of the greatest difficulties which I had to combat, was the difference of opinion which had existed among eminent jurists upon some essential points. It was impossible to reconcile contradictions. I therefore calmly read all the opinions, and then presumed to lay down my own, noticing however, in the most important places, for candor's sake, by whom and in what works my doctrines had been opposed. Had I done this as to all the controverted questions, the size of the publication must have been doubled. If any portions of this performance should appear too concise, I beg my readers to consider the very object with which I set out—the condensation of the science of jurisprudence into a clear and popular form. I also request them to remember that the “*tractatus universi juris*,”

in the library of the british museum, contains 300 or 400 times the quantity of text that this book consists of, although some of the subjects of this work are there lost sight of. The mere analysis or statement of the principal heads of law, which Bellers intended treating of, in a work which he unfortunately did not live to finish, fills 150 octavo pages. The treatise of Vattel upon the subject of the concluding chapter of this work, is of a larger size than the present volume. It would perhaps be considered illiberal to set out the circumscription of particular points, the peculiarities of reasoning, or the palpable deficiencies of other writers. It is sufficient for me to know that I have, with an ardent devotion to the subject, endeavored, in the preparation of my own work, to correct the faults discovered in former treatises; and that truth, rather than precedent, has been the object of my search.

I shall be happy if the book should have the effect of rendering a knowledge of general rights and obligations more easy and familiar to all who cannot devote to their consideration, a laborious and tedious attention. Amidst the highly serviceable and astonishing improvements of the age, it is surprising that authors do not aim to be useful, by condensing knowledge; for under a system of wire-drawn writing, a man must possess more

than usual assiduity, to attain a precise acquaintance with subjects not within his own occupation of life. They will not be insignificant contributors to the general good of mankind, who industriously devote themselves to the cautious and analytical concentration of science, from the bulky and numerous volumes through which it is dispersed. I trust that I have succeeded in my endeavor to render jurisprudential syntax easy to the comprehension of every one who will take the trouble to study a moderately-sized octavo volume.

I confess myself to be one of the small number of lawyers, who would abolish the fiction, circuitry, and technicalities which have so much tended to obscure the science of jurisprudence. I would have the laws, and their principles, as clear and intelligible to ordinary readers, as a grammar of language. I would have the very appearance of craft removed from the profession of the law. That branch of knowledge which concerns the peace and prosperity of nations, should not be concealed from the public intelligence, by a hieroglyphical nomenclature. I will never admit legal study, as a part of general education, to be of that miserably frigid, irksome character which has been ascribed to it. On the contrary, it is often found rather a source of relax-

ation, than of abstruseness. It is full of interesting, noble, and even sublime associations. It is closely connected with religion, ethics, philosophy in general, history, and political economy. If generally adopted among gentlemen, it would facilitate the grand and desirable object of simplifying and consolidating the laws. It would prepare those intended for the legal profession for its arduous reflections. It would communicate to us a taste for political philosophy. It is the duty of professional men to oppose the dogma, that legal inquiries are unprofitable to the mind. It has been said, that they are of too severe a character for young persons. But there are many who would pleausurably exchange their Æschines, their Sophocles, their Longinus, and their hebrew lyra, for Beccaria, and Vattel, and Blackstone. It is almost impossible for members of parliament, who are unacquainted with jurisprudence, to be efficient legislators. Legislative blunders are continually made, in consequence of members of parliament not being sufficiently acquainted with the laws of their country. A law-maker, with the most upright and patriotic intentions, may, through an ignorance of legal institutions, give a vote very injurious to his country. The first essential step towards the knowledge of the laws of any place, is an acquaintance with the rudiments of law in general. It has been said that

magistrates have the laws laid down for them. But does not almost every day's experience satisfy us, that the more they know of the grounds and reasons of jurisprudence, the more correct are their decisions?

To form a rudimental code of general jurisprudence, founded upon clear and just principles; and for that purpose to analyse and revise the contents of thousands of long and labored volumes, is a performance, the arduousness and anxiety of which, those cannot fully comprehend, who have not subjected themselves to it.

I have introduced, in the concluding chapter, several passages upon the practical law of countries, which do not fall within the strict line of universal law. I could not, at least in this quarter of the world, lay down a satisfactory chart of international jurisprudence, without explaining the customs and regulations prevailing in the mutual intercourse of european states, however optional the observance of them may have been, or may continue to be. In such cases, the forms which are stated, may rather be considered as established models, than as compulsory precedents.

Fully sensible of the weight of the subject, I have not spared any pains or expense, in the endeavor to render this book fit for the public eye. I have not failed to direct my mind

to the pursuit of every science which appeared to have any analogy with the theme. I have not neglected the works of any great man, whose opinions are received by jurists with respect, not however feeling myself bound to adopt, at random, the notions of any writer, however eminent, or generally correct.

Three objections are still urged, with an ungrounded degree of confidence, against treatises on the laws of nature:—

1. That a pure state of nature never has existed, or if it have, that it does not now, and never will exist; and therefore that to treat of it, is merely to theorise and speculate, and not practically to serve mankind—

To assert that such a condition never has existed, is begging the question. The fact has not been proved, and being contrary to the nature of things, never can be demonstrated. The assertion that we have never heard of men in such a state, if correct (*a*), is not conclusive to show that it never existed. Literature cannot record, excepting in the form of doubtful conjecture, or indistinct tradition, events which occurred before its existence. That a state of nature does not now, and will not, at any time, exist, is an assumption almost as gratuitous.

(*a*) See Justin. lib. iii. c. 4.—Locke on Gov. book ii. sec. 103.—Ward, i. p. 80.

Government being an artificial, and not a natural institution, all men must be in a state of nature, until, by compact, they become members of a society. All independent nations are still in a condition of nature with reference to each other. There will always then be moral persons in a natural state, unless there exist the possibility of an universal government.

But if these suppositions, just answered, were as true as they are false, it would still be of the highest service to mankind, to show the duties inculcated by nature, independently of the obligation of civil laws; not only to point out to us our duty, in cases in which those laws were silent, but also to show the rational and only proper basis upon which all laws should be founded, and to enable us to apply and interpret them according to the fitness of things.

2. That the science of ethics is uncertain and undemonstrable, depending upon the varying wills, and equally varying opinions of different men—

If this be indeed true, virtue and vice (*a*), pleasure and pain, are mere words, without having really-definable ideas annexed to them—all human actions are equally agreeable in the sight of God—and the horrid practices of barba-

(a) See Epicurus, Archelaus, and Hobbes.

rous countries have no moral wrong in them. The reasons stated in support of this dogma are, that every man forms his individual system of morality, and that no scheme can be laid down, which all men will, or in fact ought to, follow. As well might it be contended that the axioms and mathematically-demonstrable problems of Euclid are untrue and useless, because there is no such thing as a perfect sphere—an actual plane—or a mathematician's point. As well might it be pretended that two right angles do not constitute the sum of a triangle, because the diagram used by the mathematician in proving it, is not infallibly correct.

3. That in treatises upon general jurisprudence, the writers adhere only to the obligations of the moral law, and lose sight of the judicial institutions of particular countries—

It is true that morality is the unerring compass by which they steer. But it is a mistaken notion, that the broad principles of justice and benevolence, which they lay down, do not, in a great measure, govern the enactment and administration of human laws. Theirs ought to be the law of universal good, without reference to the terrors which obscure the grandeur of civil establishments. And in the inverse ratio of obedience to the universally applicable princi-

ples of sound moral law, will be found the imperfections of human tribunals.

But still, perhaps, it will be maintained that with reference at least to international law, a treatise of this kind is nearly useless, as the club of force will always supersede the wand of justice; and that it is vain to set up the dictates of reason and the rules of equity, against power and violence—against cannons and bayonets, the unanswerable logic of large communities, which Louis XIV., upon invading the Seven Provinces, expressively termed “*ultima ratio regum*.” It is the object of the latter part of this work to show for what purpose—in what manner—to what extent—and under what restrictions, the civil force should be exercised; and nations in general are not so unprincipled, as wilfully to err against the plain laws of justice. International law, or rather the greater part of it, will, upon the contrary, be found to have been observed, from very early times, by most nations at all civilised.

It is sincerely hoped that the contents of this publication are in the strictest accordance with virtuous sentiments, and therefore with the lasting happiness of our fellow-creatures. It has been the author's unceasing endeavor, in morality, to avoid fastidiousness on the one side,

and licentiousness on the other; and in politics, to divest his doctrines equally of anarchy and tyranny. The eternal dictates of truth, justice, and benevolence, have been the constant objects of his humble yet zealous solicitude.

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GENERAL INTRODUCTION.

§ I. THE existence of the Deity is evidenced by all the works of nature. If ever there was nothing, nothing could ever have existed. A subordinate series of causes and effects must depend upon a prior or eternally-incipient cause; for by taking the series to be infinite, the absurdity is increased, as then it would be an infinite body put into motion, and which, as it cannot move itself, must be moved by something independent.

The attributes of God, and the submission which we owe to him.

The universe is not God. The object of a will cannot be the will itself. An accomplishment cannot be the power of accomplishing. An act of volition cannot be the seat of volition. The effect cannot be the cause. The thing governed cannot be the governing power.

The self-existence of God, and many of his attributes, are demonstrable by reason. God is our only creator. He is essential, and therefore self-existent; for he is unproduced. We cannot suppose the possibility of nothing having existed. He is the origin of all things. He is one only; for no more causes can be fairly implied for an effect, than are necessary to pro-

duce it (*a*). He has been the great original before all things; for all things have had a cause. But being the first cause, he must be uncaused. He is called masculine, by the custom of language; but he is without gender. He has existed, and will exist for ever. He is unchangeable in his nature. He is infinitely powerful, wise, just, and good; for it is best that he should be so. He is the concentration of every moral perfection. He is incomprehensible to us. He has made us subject to the influence of temptation; but he is not the author of sin. He could not have made us perfect, and therefore free from sin, in this world of opportunity, without communicating to us the perfection peculiar to his own divine nature (*b*). He is an infinite and independent being, and cannot be fully comprehended by us. By setting bounds to his power or wisdom, we should apply to him a determination of quantity inconsistent with the qualities essential to a first cause. He is, strictly speaking, incapable of grief, pain, hope, or repentance; for those feelings imply want, and limitation of power. He has in his character no malignity, imperfection, or evil quality. He attains all his ends by the most simple and perfect means. He is indivisible, omniscient, and omnipresent. He is the only absolutely-free being. He is incapable of performing inconsistent or imperfect acts. He is consistently almighty. He is all harmony and order. His supposed creative anomalies exist only in our errors of judgment. He causes good to be produced

(*a*) See Tillots. *Princ. Nat. Relig.*—Plat. *Phæd.*—Sir I. Newton.—Pythagoras.—Spav. *Puff.* i. p. 159.

(*b*) See *Monthly Repos.* Feb. 1823.—Voltaire's and Vauvenargues' *Notes on Bl. Pascal.*

out of evil. His preserving, are consistent with his creating, laws. His general rules of creation, once prescribed, are never abandoned; because they were originally all-comprehensive and perfect, and therefore insusceptible of improvement. He is infinitely attached to order. He cannot govern the world without rules. It does not derogate from his divine majesty, that the effecting of contradictory things cannot be ascribed to him; for it is meant by this, that the rules which he has clearly established, are so wise, as to be incapable of alteration. It is not profane to ascribe consistency to the Deity, and to believe, that by a divine volition four can never be less than two, in the same sense in which they are four; or that the whole of a thing can never, by any divine volition, be less than a part; that a triangle cannot be a circle; that a being cannot greatly love and greatly hate another simultaneously; or that it is impossible for a thing to exist and not exist at the same time. Such things being obviously contrary, as men universally admit, to the laws of nature, which are the will of God, are impossible to be accomplished. To suppose them to be capable of accomplishment, is to imagine the production of things contrary to the will of God. Evil is inconsistent with the nature of God, and is therefore impossible with him. His justice, benevolence, and perfect fulfilment of promises depend, not upon an obligation on him, but on his supreme nature. All his works are the emanations of infinite wisdom.

God, by the act of his creation, has a right to prescribe to us such rules of conduct, and such restrictions upon our indulgences, as, in his adorable wisdom,

are fit for our government. For it is impossible but that he should know those means of happiness and duty, which conduce to the end which he has had in view in creating us. And as we exist in entire and absolute dependence upon him, it is obviously necessary for us to obey his will in all things. Our obligation to obey him rests upon his power, wisdom, and goodness. He is under no obligation to us. We may naturally expect punishment, if we disobey him. We must not therefore murmur at the obedience due to him. The more strictly, perseveringly, and patiently we observe his laws, the more shall we conform to his will. And the ever-consolatory reflection, that he is a God of universal love, must, upon all occasions, render that conformity a ready sacrifice on the part of reflecting men.

God is necessarily the original of all moral laws, established for the regulation of human life. It is obvious, from the reason with which men are endowed, that they are not to live like brutes. They are bound, in a natural state, to obey those rules which God has established; and, in a civil state, those, which men, as his ministers (*a*), have prescribed for the happiness of the human race. It is such obedience only which can be rational—which insures the preservation of human interests—and which is always obligatory; as the authority of God can never be renounced or resisted.

The existence of these characteristic attributes of the Deity is deducible from an inspection of the works of nature.

Of the bene-
volence of
God.

II. It is of extreme importance that we should be

(a) See Spav. Puff. ii. p. 194.

satisfied of the love of God. The arguments for it are:—

Our own existence, without which there cannot be enjoyment. Annihilation, or non-entity, is to all a painful thought.

Our physical aptitude of parts, from the mere opaque spot with which we commence our existence, to the mature developement of our organs and faculties, and to the time of our death.

Our susceptibility of intellectual and physical enjoyment, and the endearing connexions of life, of which God has rendered us the objects.

The revelation of a future state, and of the duties to prepare for it. This argument, however, will, of course, avail with those only who credit revelation.

No gratitude would have been due to the most sublime Author, from a being whom he had created to be miserable. But as all nature transcendently glows with motives of gratitude to him, we cannot but believe that love is the eternally-impelling impulse of the infinite spirit. The sciences of metaphysics, chemistry, anatomy, astronomy, and natural philosophy in general, proclaim, in unanswerable language, the benevolence of the adorable Author. The greater are the discoveries made by the scientific, the more wise and extended appears to be the goodness of the design. The abuses to which earthly things are subject, are as nothing, when compared with their excellent uses. Evil weighs but a feather in the universe of love. The infinite kindness of God is overwhelmingly exemplified in such of his works:—

As we see without any study—

As we see with ordinary study—

As we see with the most abstruse and deepest investigation—and

As we shall still see, after the improvements and discoveries of science have opened to our view new scenes of creation.

If, in many things, there be uses continually and newly discovered, it is a fair inference that there are an order and a reason in what we do not understand. And if it be apparent that the common good of rational beings is the design of God; his intention that we, as his creatures, should, by all the means in our power, forward that design, is equally evident.

Of moral agency.

III. The science of ethics is perfectly demonstrable, for it is founded upon the evidences of our senses, and upon natural reflection.

Our moral nature renders us capable of perception and action. There has been much dispute upon the subject of the nature of virtue (*a*), and on the freedom of the will (*b*). Mankind are, however, generally agreed in their ideas of moral right and moral wrong,

(*a*) See Kaimes, Hutcheson, Price, Hartley, Sir William Temple, Acquinas, Leibnitz, Warburton, Barbeyrac, Hobbes, Grotius, Clarke, Lord Herbert of Cherbury, Beattie, Cudworth, Ellis, Butler, Adams, Burlamaqui, Locke, Cumberland, Heineccius, Soame Jenyns, Rutherford, Johnson, King's Origin of Evil, Cicero's Off. book i. c. 2.

(*b*) See Grove's Mor. Ph. i. ch. 3.—Epict. lib. i. c. 1.—Cic. de Fato.—Andron. Rhod. lib. i. c. 3.—Dr. Clarke's Attrib. and his Rem. on Hum. Lib.—Plat. Phæd.—Simplic. Comment. in Epict. c. 1.—Luc. de Rer. Nat. lib. ii.—Ter. And. Act. i. Sce. 5.—Diog. Laert. Vit. Zen.—Locke's Hum. Und. book ii. c. 21, sec. 8 and 10, and c. 21, sec. 31.—Hob. Tripos. iii. p. 274.—King de Orig. Mali, pp. 118, 145, 147.—Turnb. Hein. i. sec. 3 and 4, and 53 to 60.—Epict.—Arrian.

and admit that they have the power to avoid evil, and to do good. No sane man denies himself to be the advocate of justice and general happiness. We are all, more or less, indignant at oppression, and compassionate to the wretched; at least in profession, if not in practice. We all attach punishment to ill desert, and consider it with reference to the capacities and inclinations of the agent. All who through reason discover the difference between good and evil, must perceive their duty to follow the former, and shun the latter. The regulation of human life requires fixed methods of conduct in its different stations and circumstances. Without, therefore, entering into a lengthy preparatory discussion as to the much controverted and technical niceties of moral philosophy, we may determine our duty to God, to ourselves, and to mankind.

Virtue is the performance of our duty, by obeying the will of God, for the sake of attaining the greatest possible happiness, of which we are capable. As God has rendered our lives neither the subjects of misery nor indifference, and as the universe, at least so far as we are acquainted with it, abounds with eloquent and impressive testimonies of the contriving kindness of its infinite maker, it is unreasonable to deny the divine benevolence; and that the end of virtue is happiness upon the whole, none will dispute, who acknowledge the infinite goodness of God. It follows, from this axiom, that, in framing laws for our regulation, universal enjoyment is to be kept in view, and that no action is obligatory which does not depend upon man's private happiness. But actions must be considered in all their parts, modes, and influences, before their virtue,

or want of virtue, is determined. Whatever may be the immediate, or associative motives of the mind, prompting it to the commission of right, they are all resolvable into the ultimate, or self-satisfactory motive of expediency. But it is not therefore to be concluded that our limited notions of particular happiness are such as the all-wise comprehension of the Deity approves. I mean, that the axiom is never, for individual convenience, to be made an apology for violating any of those sound and general principles of moral government, which produce the very end proposed—general good.

The laws of God are necessarily what they are; and it is worse than needless to inquire whether they could have been otherwise.

Conscience is our reason as to the moral nature of acts, and their consequences.

The correctness of actions is ascertained by their immediate utility and remote tendency. The virtue of the agent is measured by the goodness of his design.

Definition
and nature of
general laws.

IV. A law, in its jurisprudential sense, is an obligatory rule of conduct, dictated by a superior, ordaining what is, or is not to be done, and leaving to us, or not leaving to us, a discretion of certain action.

Permissions, being negative, are not laws. Permissions are either silent or expressed. We have a general liberty to do or neglect all such things as the laws are silent about. It is a law, however, not to hinder any from the full enjoyment of those permissions which extend to them.

Laws are either—1, natural; or 2, positive.

Natural laws are such as our human nature obvious-

ly obliges us to observe for the preservation of our happiness. Thus acts opposed to the common interests of the species, and to the rational enjoyment of our health, and moral and physical faculties, are infractions of natural law.

Positive laws are either those which God, as the author of our being, or a duly-constituted human authority, having a right to direct our conduct, has expressly prescribed to us. The commands of God, excepting those peculiarly directed to particular individuals, are of general and peremptory obligation. His power to render us happy or miserable, added to the argument of his creating us, must prove his laws to be obligatory. The natural difference between virtue and vice may be discovered; but there are many laws which nature and reason might never have taught us, but which revelation renders it imperative upon us to observe.

Actions are:—

Good, *i. e.* conformable to the preservation, happiness, and perfection of mankind, or

Bad, *i. e.* injurious to the general interests of men, or

Indifferent, *i. e.* not affecting the welfare of our race.

The following are the general tests by which all wise laws may be tried:—

They are consistent with the will of God, and made by a superior power, having authority to prescribe them to us.

They conduce to the greatest possible good of the greatest possible number.

They are the simplest means, and most conducive

to the end proposed by them, certain and determinate, impartial, and consistent with each other.

They are possible of performance, and suited to the natures, circumstances, places, times, and offices of those who are to observe them.

They are just and intelligible, and incapable of opposite constructions.

Their infraction renders the violators amenable to the governing power, or law-maker. The persons commanded to obey them are interested in such obedience.

They are never obviously and radically detrimental to the existence of civil society.

They prohibit the prevention of doing what they permit.

In fewer words, all laws should be consistent with God's will, imperative, expedient, effectual, consistent, possible of performance, and suited to the observers, just, intelligible, incapable of double meanings, penal, and applicable.

As the right to refuse to observe laws, for the reason of their not being grounded upon the above principles, would be attended with perpetual and manifest inconveniences, and, in most cases, would be the mere excuse of caprice or obstinacy, we are bound to obey all laws which a duly-authorised power prescribes to us, provided they be:—

Morally possible, *i. e.* capable of performance, without breaking the will of God, and

Physically possible, *i. e.* provided our bodily natures do not render our obedience to them impossible.

For laws cannot have authority either to contra-

vene God's will, or to render us liable to punishment for not doing that which the Author of our being has circumscribed us from the power of accomplishing. And the disobeying of civil laws, upon the ground of their being contrary to natural law, is to be justified only by the clearest conviction of such inconsistency; and we should deliberate most circumspectively before we so decide.

Obedience to laws of all kinds should be induced, so far as it is possible, by love, and not by fear. The former quality bears the seed of constancy—the latter, that of destructiveness.

The necessity of laws is exhibited by the following syllogism:—

Every moral aim requires the rational means of attaining it. Happiness is the moral aim of man. Therefore the attainment of happiness requires certain rational means, which are laws.

V. There are three kinds of law which we are bound to obey:—

Definitions
of natural,
civil, and in-
ternational
law.

1. The law of nature, or of the material world, *i. e.* such moral rules as the will of God, our own nature, the fact of our being men, and the constitution of things, render it immutably and universally necessary for us to observe, in order to be happy. The knowledge of this law is acquired by the exercise of our reason, or by the light of revelation. This law may be said to be known to all men, because it is taught to them by the observation of their senses, and super-added reflection. It leads the faculty of our wills to our physical and moral preservation, and perfection.

It has been affirmed by highly respectable writers (*a*), that a proper knowledge of the law of nature is attainable by the use of reason, without the aid of revelation. The rules to be immediately traced from natural theology are, in fact, divine revelation. They are unwritten, and deducible only from the exercise of reason; but their existence is obvious to all, and is in perfect accordance with written revelation. Both reason and revelation teach the will of God. But natural reason alone, will not, it is thought, lead man to a complete enjoyment of happiness.

This law, properly speaking, does not bind the brutes, who have not sufficient reason to be capable of moral obligation. Their submission to the course of nature arises from their unavoidable instinct, not from the exercise of reason.

2. The civil or municipal law, established by the civil power of a nation or community, for the observance of its subjects. This law consists of the legislative enactments of the particular country, and of such legal decisions of its courts of justice, as are recognised by the judges administering justice within them. This is the law of nature applied to the government of states.

3. International law, commonly called the law of nations (*b*), which are such imperative regulations

(*a*) See Wooddeson, *El. Jurisp.* p. 13.—Locke's *Hum. Und.* book i. c. 3, sec. 82.—Grot. *de Verit. lib. ii.*—Tunstall's *Lectures*.—*Contra*: Ruth. on *Virt.* c. 13.

(*b*) See *Cic. de Off.* lib. iii. c. 5.—*Rom. L. Dig.* lib. i. tit. 1.—Grove's *Mor. Phil.* ii. p. 96.—*Wicquef. de l'ambass.* i. 1. 27.—*Suarez. lib. ii.* 6, 17.—*Burlamaq.* i. p. 195.

founded on the laws of nature, as are taught by the reason, and established by the common consent of countries; to guide their intercourse with each other. To be conversant with this law, we must become acquainted with the history, and prescriptive and express conventions of states; and in cases of difficulty or doubt, we must decide by the rules of justice and humanity, never forgetting the civil law, and the interests of nations in general.

These several descriptions of law are consistent with each other, and have human happiness for their object. It is obviously proper and convenient, for the purpose of the present work, to consolidate the two latter branches. I shall therefore treat:—

1. Of the laws of nature.
2. Of the laws of nations.

The former naturally precede civil and international laws, in order of time; and an inquiry into them will greatly facilitate the latter subject of investigation. It will be consistent with the nature of the subjects, so to frame the second division of this treatise, as, first, to develop in it the principles of the civil law; and, in the concluding chapter, to apply them to the intercourse between separate nations, in order to lay down a system of international jurisprudence.

VI. The doctrine of the eternity of the world is opposed to the existence of a first cause.

There is no confusion in nature. Her operations are wise and systematic. No principles of the law of nature are transmitted to us in the form of innate ideas; for our knowledge of them is acquired sensibly, and by

The law of nature philosophically considered.

the developement and exercise of the mind (a). But they are highly agreeable to reason when known. The right use of reason teaches us the law of nature, by shewing to us the constitution and wants of mankind. This assertion is not negatived by the fact, that there are many who do not know, and some who cannot understand, the force and connexion of the precepts of nature; for so it is of mathematics. The foundation of the natural law is justice, not deceitful and momentary interest. True interest is exemplified by happy and solid consequences upon the whole.

The relation of God to man, being of a very different character from that between man and man, and the knowledge which we have of man being much more perfect and intimate than that which we have of God, we are not to judge of divine justice on exactly human principles of conduct; for that must lead us into absurdities. Thus, when the Deity commands any thing contrary to the general course of things, the law of nature is not dispensed with; but its usual system is suspended. All the works of nature are correspondent with each other. To suppose the contrary would be to charge the Deity with an inconsistency opposed to his nature.

Men may enjoy their natural propensities, so far as their well-exercised reason permits. They are not restrained from the gratifications of true pleasure. They are only to circumscribe their enjoyments within the limits which their duties and judgments point out.

(a) See Locke, *Hum. Und.* book i, c. 11.—Burlamaq. i. p. 181.—Spav. *Puff.* i. p. 137.

The body of man is made up of several organs of life, motion, and enjoyment, which gradually develop themselves until their maturity; after which they decay, and become insufficient to perform the demands made upon them. Death, which puts an end to all suffering, ensues. It occurs but once. We do not perfectly understand it. We ought not to condemn it. It is doubtless a wise appointment.

The intellectual part of man is his soul—a noble organ of reflection, which is intended not only to impel his body to action; but also to direct its motions with wisdom, to render it the instrument of a happy and virtuous career of life, and to subject his appetites to its control.

There are some involuntary actions of the body, which are always morally innocent. The rest are voluntary, the goodness or badness of which depends upon our exercise of the understanding and the will. Whatever is contrary to reason is opposed to happiness. The importance therefore of regulating our bodies, by means of the wisdom and virtue of our souls, is manifest. The constitution of man shews the intention of the Deity, that he should consult his preservation, perfection, and happiness.

Man being blessed with such superior excellencies, as he possesses over other animals, his reason should lead him to exemplify his gratitude, by obedience to the divine will, as manifested in the works of nature.

No rational man can suppose his own preservation and happiness to be the entire end of the great God. No man can possibly consult his own interest, independently of that of his fellow creatures. That is not to be universally denominated the law of nature, which is

consented to by mankind at large; for the most civilised nations have been grossly mistaken, in knowledge of all kinds; and true wisdom exists less generally than is supposed. Those things which, in all places, and at all times, appear injurious to mankind, are prohibited by the law of nature; and whatever universally contributes to human good, must be commanded by that law.

The noble endowments of man are as applicable to the good of his fellows, as of himself, and often more so. Each man is a link in the great chain of humanity. Therefore, unless men act with the view of conciliating and assisting others, they cannot be happy.

The state of
nature defined.

VII. The state of nature is the condition in which nature has placed us, without reference to artificial civil institutions; and in which we have no sovereign but God. It is not, as it has been supposed (*a*), necessarily a state of war.

Chief characteristics of the
law of nature.

VIII. The law of nature is the will of God, and all men are bound to obey it, notwithstanding the enactment of any contrary human law; for we can owe to no human power an obedience superior to that due to our Creator. It is essential to the existence of things; and being therefore primitive and fundamental, all other laws must have reference to this. It is uniform, consistent, invariable, eternal, immutable, and common to all times and countries. It is capable of accurate demonstration, being founded upon the evidence of our senses, and upon the nature of things. Its doctrine is conformable to our reason:

(*a*) See Hobbes.—*Spav. Puff.* i. p. 119.

the exercise of which is a part of the law of nature, and to suppose that we are to exclude reason from our inquiries into this science, is to argue that the law of nature is unreasonable, and inconsistent in itself. It is just; the punishment which it inflicts, being established and obvious, conducive to general good, and proportioned to the transgressions committed. It is pacific, tolerant, and benevolent; all men having an equal right to freedom of person and thought. Its observance always renders men happier and better; and its infraction *vice versa*.

It prescribes the practice of virtue, by the existence of pleasure and pain, of which our natures are susceptible. It consists in action; for mere abstract ideas cannot, of themselves, serve either ourselves or others.

Reason is its basis.—

Virtue its mode of performance.—

Happiness its end.

It is founded on the most comprehensive utility (a).
Whatever is essential to its ends, has the obligation of law.

IX. The grand or fundamental law of nature, Its leading principles.
is to behave ourselves conformably to reason in all things.

The leading principles of the law of nature are:—

Whatever is opposed to reason, or to the physical constitution or general welfare of mankind, is unnatural.

It is our duty to obey and worship God, whose

(a) See Van Eck. Princ. Jur.—Harl. MSS. 5033, p. 2.—Valentine.—Albertus.—Velthenius.—Strimesius.—Janus.—Aulus Gellius.

existence, as a supreme power, appears from the harmony and wisdom of the universe.

To study self-preservation, to be temperate and rational in our individual enjoyments, to instruct and enlarge our minds, and, by industry and management, to render ourselves as intellectually and physically healthy as possible.

To be just and benevolent to our species; and, for this purpose, to do as we would be done by, and to commit no causeless harm.

For the sake of our, and our species' happiness, to marry, as soon as we can do so conveniently, and with comfort to ourselves and our wives; to love our wives, and to render our children strong in body, intelligent in mind, and virtuous in action.

To treat with respect, such regulations and customs, as are, from motives of expediency, generally established amongst mankind, and to consider all men as equally free from the dominion of each other, which is the condition of natural equality.

To be patient in all trials of affliction.

To endeavour, by diligent study, to attain the truth; and to disseminate it without the least persecution.

The rational agreement of all nations is to be presumed a law of nature (*a*); although that law arises from reason, and not from consent.

Every man has the execution of the law of nature.

To inflict no unnecessary pain on brutes.

It would be inconvenient, to divide the following treatise into these branches; although all the laws here-

(*a*) See Cic. *Tusc. Quæst. Disp.* i. 13.—Harl. MSS. 7159, p. 54.

after laid down, will be found referrible to one or more of them.

X. The inseparable connexion between the means proposed, and the end to be attained, will not fail to strike the reader's attention.

Its immediate
connexion
with happi-
ness.



BOOK I.

THE LAWS OF NATURE.

CHAPTER I.

OF RIGHTS AND OBLIGATIONS.

§ I. ALL men are naturally independent of each other's control, are equally objects of rights and obligations (*a*), and are the judges of their own actions. An equality of right excludes any superiority of power. There is, therefore, no common law between them naturally (*b*).

Equality of mankind.

II. A right is that quality in a person which renders it just for him to possess certain things, or to do certain actions, consistently with the laws (*c*).

Definition and nature of rights.

Rights are perfect and imperfect; alienable and inalienable; natural and adventitious:—

(*a*) See Noodt on Sov. Pow. p. 10.—Locke on Gov. book ii. sec. 4 & 5.—Hook. Eccl. Pol. book i.—Locke on Gov. book ii. cc. 2 & 6.—Hobbes.—Harl. MSS. 1325, pp. 115 and 144.

(*b*) See Burlamaq. i. p. 198.

(*c*) See Ruth. Inst. i. p. 27, 28.—Paley, i. book 2, c. 9.—Bl. Com. i. c. 1.—Burlamaq. Princ. Nat. 8vo. 1748, book i. p. 2.

A perfect right is a fixed and determinate right to possess or to act; and which we may carry into execution by force, without infringing upon the rights of others. Thus the rights of personal defence, and protection of property, are perfect.

An imperfect right is a right to enjoy or to do that which is vague and indeterminate, and naturally depends on the discretion of another; and which we cannot, with force, insist upon, without breaking in upon the rights of others. Thus, a very distressed man has an imperfect right to relief; and the best qualified competitor for a public office has an imperfect right to the appointment. A parent has an imperfect right to an adult child's obedience, in some cases.

All rights are alienable, which the law of nature does not forbid us to part with. We can transfer only those rights which we possess.

Inalienable rights are such as we cannot part with, consistently with the law.

Natural rights are those which the mere circumstance of being a man immediately conveys; as life, liberty, character, integrity of body, &c. (a).

All other rights are adventitious, as command, distinctions, &c.

The happiness of men is in proportion to the protection which their rights receive. The violation of all kinds of rights is forbidden by the law of nature, which protects every man in the possession of what he has acquired a right to, consistently with such law.

Definition
and nature of
obligations.

III. An obligation is the duty which a man is under, to submit to and preserve the rights of others.

(a) See Ruth. Inst. i. p. 35.—Burlamaq. i. p. 75.

It is always connected with our gain or loss (a):

A perfect obligation exists in cases in which the right is perfect. Thus we are commanded to "do no murder." This precept is precise, and admits of no moral discretion.

An imperfect obligation relates to the observance of imperfect rights. Thus we are taught to 'honor our father and mother.' This command is indeterminate, and leaves the extent of honor to our virtuous discretion.

IV. Rights and obligations are correlative terms. Rights and obligations correlative.
We are under an obligation to observe the rights of others. The obligation is perfect or imperfect, according to the correspondent nature of the right. Opposite rights, like opposite duties, are impossible.

V. No person has a natural right arbitrarily to decide upon the rights of others. On rights and obligations generally.

Infringements upon perfect obligations vest no right in the violators. They are void as to any moral effects which might have been produced by them. No violation of a perfect right can vest a new acquisition in the transgressor. In this sense no injury can produce a right. Thus a thief has no right of property in the thing stolen. Infractions of imperfect obligations do not take away a power of acting given by the law. Such acts are therefore not void. In this sense, what was naturally unlawful to be done, is legally valid, when done. Thus the marriage of a son of full age, contrary to his parent's reasonable and

(a) See Paley, i. book ii. c. 2.—Cic. de Leg.

express request, is of full effect, although a breach of his imperfect obligation.

Acts, which, in their effect, manifestly abrogate laws of imperfect obligation, are void. For moral agents have not power wholly to release themselves from laws of imperfect obligation. Thus, the marriage of a son with his mother is void, because it subverts the filial law of nature, as a husband cannot honor a wife as a son.

Things which are the subjects of rights are:—

Corporeal; such as are the objects of our vision or touch; or

Incorporeal (*a*); which are the contrary.

The division of rights, into those of possession and action, will be observed in the following arrangement.

(*a*) See Bynk. de Rebus Mancip. c. 8.

CHAPTER II.

OF PROPERTY.

§ I. PROPERTY (*a*) is the exclusive right which we have to use and dispose of our possessions, absolutely, and without the interference of any other person.

Definition of property.

II. All things belonged originally to mankind in common (*b*). The benign Giver of all gifts did not distribute them to some, to the exclusion of the rest of the species. In the state of a community of things, the first bodily occupancy, and use of so much only as human wants from time to time required, supplied the place of property (*c*). In this primitive state, every man had a right not to be hindered from using whatever

Community and origin of property.

(*a*) See Bl. Com. ii. c. 1.—Locke on Gov. book ii. c. 5.—Godw. Pol. Just. ii. p. 788.—Plato. Rep.—Sir T. More's Utopia.—Gull. Trav. part 4, c. 6. Ogilvie on Property in Land.

(*b*) See Chronicon of Eusebius.—Aristot. Polit. lib. 2.—Bl. Com. ii. c. 1.—Genesis, i. 28.—Cic. de Fin. lib. iii. c. 20.—Just. lib. xliii. c. 1.—Spav. Puff. ii. p. 27.—Locke on Gov. book ii. sec. 26.

(*c*) See Grove's Mor. Phil. ii. p. 390.—Paley, i. book ii. c. 11, and book iii. part. i. c. 1.—Tyrr. L. of Nat. c. 4, sec. 7.

land or produce he had appropriated to himself, and he immediately wanted for rational use (a). And the bestowment of bodily labor on a thing, was the only mode of acquiring a positive title to it (b). Agriculture could not flourish, nor its fruits be improved, or ripened into maturity. Ingenuity was not sufficiently rewarded. Disputes continually arose. The industry and ingenuity of man were checked. Pre-occupation, by slow degrees, communicated, with the consent of men, either express or implied, a right of self-appropriation; and the introduction of money has greatly extended it. The increased wants, improved agriculture, and valuable elegancies of incipient civilisation, gave birth to the distinctions of property. Men were unwilling to labor merely for usufructuary purposes. The exclusive right of property was therefore introduced by man, and arose from compact (c). This right has set at rest the continual questions of claim, which are inseparable from a state of community. The compact is to be traced either to actual division, or to permissive occupancy. Both modes imply the general consent of mankind, and are therefore consistent with the law of nature.

Acquisitions are either:—

Original, such as first constitute property; or

Derivative, such as confer property by conveyance from others.

(a) See Cumb. Orig. Gent. c. i. sec. 22.

(b) See Genesis, ch. xxi. 30.—Locke on Gov. book ii. sec. 27 and 43.—Laws of Menu.—Sir W. Jones, iii. 341.—*Fennings v. Lord Grenville*, 1 Taunt. Rep.

(c) See Ruth. Inst. i. pp. 40 and 47.—Vatt. book i. c. 18, sec. 203.

III. We have some things in common with our species (a). To other things we have an exclusive right, usually known by the term 'property.'

Nature of property.

Property is either:—

Collective, *i. e.* the exclusive right of a body of individuals to a thing; as where they seize and settle upon an uninhabited track of land, or

Private, *i. e.* the exclusive right of an individual to a thing.

Property in land or goods ceases by the relinquishment of the owner, or by the extinction of the legal proprietor. In either case they revert to their common state; the exclusive right to them not being in any particular individuals, but in the general body to whom the territory belongs.

Moveable goods without an owner may be seized by the exclusive owner of land on which they are found, by the right of first occupancy, unless such seizure be restrained by agreement of the collective body.

IV. The rights attached to property are:—

Rights attached to it.

Possession against all the world (b), and the protection of it against force.

To use the thing, with all the profits and advantages naturally or artificially resulting from it, as the owner pleases (c).

Such powers and remedies, without which the thing itself cannot be perfectly enjoyed.

(a) See Cic. de Off. lib. i. c. 7.

(b) See Turnb. Hein. ii. sec. 231, note.

(c) See Tayl. Civ. L. p. 131.—Turnb. Hein. i. c. 12.—Spav. Puff. ii. p. 78, and c. 7.—Les Cinq. Codes, Code Civil. ii. tit. 2, 546.—Locke on Gov. book i. c. 9, sec. 92.

Restitution, when lost or taken away; which right will be fully explained in the fourteenth section of this chapter.

In breeding animals, the young goes with the dam, because the sire is generally unknown, but the dam is always certain. The dam has all the trouble and pain of gestation, and is for a time unfitted for work. The additional reason sometimes alleged (*a*) that the young was part of the female, but never of the male, is, to say the least of it, disputable.

Of accession.

V. Things sown or planted accompany the ownership of the soil; and the graft follows the trunk. Where an accession arises from the bad design of a party, he is not entitled to the fair value of it, or to its surrender; but where from a good or innocent design, he is. In innocent cases, the person whose property in the thing is the more valuable, should keep it, paying to the other the value of his loss (*b*). The owner of the original thing is entitled to the value of it, or to the damage arising from the alteration made in his property; but he cannot claim it, if the accession, labor, or art bestowed on the thing, be invaluable (*c*).

Of the limitation, cessation, and use of property.

VI. Limitations of property arise either from express grant, tacit consent, or custom.

Such limitations are of three kinds:—

1. Of continuance, which term explains itself.
2. Of use or service. Services are subdivided into

(*a*) See Spav. Puff. ii. p. 47.

(*b*) See Turnb. Hein. i, sec. 258.

(*c*) See Spav. Puff. ii. p. 49.

the use of personal things, as horses, slaves, books, furniture, &c.; and of real advantages annexed to an estate, as the rights of resting parts of edifices on the property of another, or of prospect, water-courses, or path-way.

3. Of disposal, as in the cases of trust-property, and pledges, restraining the proprietor from free and discretionary disposal.

Property should be used according to the uses intended by God.

VII. The following things are common, notwithstanding the introduction of property; either because they are incapable of appropriation, or because they have never been appropriated:—

Of Property
still of com-
mon right.

1. The ocean (*a*), which being large enough to answer the occasions of all mankind, could not morally have been the subject of exclusive right. Nor physically, for its surface being ever changeable and yielding, cannot have that certainty of division, [and determination of form, which constitute boundaries, and are essential to the distinction of property. Its shores are not lasting and clearly defined limits. Lastly: it is incapable of division or occupancy, and therefore never could have been vested in particular persons.

2. Banks of sand, to which [the same reasoning will partly apply; unless belonging to some moral person, or body.

3. Rivers, bays, lakes, straits, and large pools, unless they have been specially and permissively converted. Although they consist of a fluid body, yet being

(*a*) See Turnb. Hein. ii. sec. 173.—Spav. Puff. ii. p. 36.

within banks or shores near to one another, they are sufficiently determinate to become the subject of property. That property, however, must clearly exist, to defeat their generality of nature.

4. Tracks of land (*a*), or islands on which no one has settled; and unappropriated goods.

5. Such untamed beasts, birds (*b*), fishes, insects, and zoophytes, as are not in the possession of another. If they escape after capture, their wildness raises the presumption of their not being recaptured. But when they have been tamed, the property in them is fixed in the tamer. No man can have a right to hunt, fish, or fowl on such lands or water as are the exclusive property of another.

6. Inexhaustible things (*c*), as the air, warmth of the sun, light, and running water, which all men may equally enjoy, and which never could have been agreed to be rendered the subject of exclusive property (*d*), so far as their necessity for the preservation of life, and the enjoyment of our natural faculties, extend.

7. Things which are hurtful, or of no advantage to mankind (*e*).

Principles of
common use.

VIII. Things which are common are to be used share and share alike.

(*a*) See Spav. Puff. ii. p. 39.

(*b*) See Spav. Puff. ii. p. 40.—Grot. book ii. c. 5.

(*c*) See Turnb. Hein. i. sec. 235.

(*d*) See Spav. Puff. ii. p. 35.

(*e*) See Turnb. Hein. i. sec. 235.—Petronius. Satyr. c. 6.

IX. The finder of a thing lost or abandoned is, in a state of usufructuary property, entitled to it. The mere circumstance of seeing it found, does not entitle the observer, to any share in it (*a*). The proprietor of the ground on which it is found, is entitled to half of the thing (*b*).

Of things lost and abandoned.

X. Our common right to the use of things remains, after appropriation, in cases of extreme necessity. For it cannot be presumed that men ever consented to give up the necessary means of self-preservation, or, if they did, that they could part with an inalienable right. On all occasions, therefore, on which lives are absolutely endangered, we may so use or destroy the property of our neighbours, as to rescue ourselves from destruction (*c*). Application must be made to the owner for relief. All previous means must be first tried. The failure of those means alone will justify the act. The claimant's necessity must be greater than the proprietor's; for if the wants of both be equal, the former occupant has the better right. Restitution, to the full value of the property, at the time of its being used, all things being considered, must be made by us, so soon as it is within our power. The right ceases with the necessity; and then the obligation to restitution commences (*d*); for the laws of property

Principle of extreme necessity setting aside property stated.

(*a*) See Turnb. Hein. i. sec. 248.—Diog. Laert. i. 57.—Phædrus, Fab. v. vi. v. 3.—Plautus, Rudent. iv. iii. v. 72.—Ælian. Hist. Var. 3. 45. 4. 1.

(*b*) See Everard. Otto. de Rer. Div. sec. 29.—St. Matthew, xiii. 44.

(*c*) See Cic. Off. lib. iii. c. 6.—Spav. Puff. i. p. 226.—Paley, i. book iii. part. 2, c. 5, and ii. part. 1, sec. 3.

(*d*) See Ruth. Inst. i. p. 80 to 86.

are inviolable, so far as is consistent with general safety.

We have a right to use another's property, beneficially, if the owner sustain no harm thereby; for the thing will still answer the several purposes of the proprietor, which is all that particular ownership was introduced for. But if it may be reasonably inferred that the thing has or may have a value in his mind, the reason ceases; as he may then sustain the harm to be guarded against. Pretences must not prevail against property. Men have often good internal reasons for their refusals, which are not apparent to others. The proprietors are the best qualified to judge whether the supposedly-harmless use renders the property less beneficial to them. This right therefore is imperfect.

Derivative
acquisitions.

XI. Derivative acquisitions (*a*), by the law of nature are:—

1. Such as are transferred with the previous owner's consent.

A clear design to accept is necessary to complete a derivative acquisition. This design must appear by outward signs; so that mankind may know it. As there must be two concurrent parties to acquisitions, alienations may be revoked before acceptance. But acceptance may precede alienation.

2. Reprisals (*b*). If any one have injured us, by depriving us of that to which we have a right, and which we cannot recover back; the natural law of justice entitles us to seize, and thereupon acquire a pro-

(c) See book ii. c. 2.

(d) See book ii.

perty in so much of the injurer's goods, as is fairly equivalent to the loss sustained. The right to recover what is so due to us, is obviously just.

XII. Those who are incapable of acquiring full property are infants, who have not attained the use of reason; idiots, who never will possess it; and madmen, who have lost it. For no free derivative acquisition can be made, without the consent and notification of the maker. But consent and notification, without the use of reason to judge of them, must be void. With madmen, the intention to keep up the claims of property, can be presumed only, after their loss of reason.

Persons incapable of acquiring property.

XIII. Prescription (a) is our right to a thing, acquired by long, uninterrupted, and just possession, and founded upon the tacit consent or implied dereliction of the original proprietor. Such right of prescription, therefore, arises from acts, either:—Positive, by openly declining to act; as being present at a transaction, and not opposing it, or—Negative, by omission; as where cattle have strayed, or goods are lost, and no pains are taken to discover them; or as where absolute possession of our land or goods is permitted, without our claiming them. They then become the exclusive property of the subsequent possessor, in the character of first occupant.

Of prescription.

But permission to hold, as tenant or agent, cannot

(a) See Ruth. Inst.—Grot. book ii. c. 4.—Les. Cinq Codes, Code Civ. liv. iii. tit. 20.—Civ. L. Dig. 41. 3. 3.—Cic. de Off. lib. ii. c. 23.—Spav. Puff. ii. pp. 55 and 74.

change the property, so as to entitle the holder to it, against good faith.

Presumption of neglect cannot justly exist, where the original owner has, by ignorance of his rights, or by deception, or personal fear, been prevented from claiming what he is entitled to. If he knew not that he had a right, he could not be supposed to relinquish it. And if fear or fraud induced his neglect, his mind could not have voluntarily consented.

Prescription must be gained by possession; that is; long, or immemorial, so that the intention to relinquish may plainly appear, and that no suspicion of ignorance or fear may exist; uninterrupted, without which the dereliction cannot be presumed; and just, for otherwise fraud or force must have been resorted to. And as presumption cannot prevail against certainty, this defect of title must always continue.

Prescription is a right to corporeal things, as goods; or to incorporeal, as command. It is founded upon reason, considering the natural tendency of mankind to keep possession of what they have gotten. The fact that men in general plead the claim of prescription, justifies the conclusion, that it was originally as much established by common consent, as the institution of property.

The equitable construction of the term 'immemorial prescription,' is not such a duration of time as the memory of man cannot embrace, unassisted by documentary evidence; nor such an extension of time as the memory of any living person, assisted with extant traces of record, will develope; but so long a period as to preclude the original owner from making out a clear

and indisputable title, and reasonably to determine the property to be in the present possessor.

Prescription can exist only in those cases in which more certain evidence cannot be had (*a*).

XIV. We are under the same obligation to restore the property of another, as not to take it from him. This obligation takes effect so soon as we know who is the just owner. If an article be given or sold to us, by a person who had no right to it; or, if we find a thing accidentally lost; we are bound to return it. Any wilful acts of deceit or concealment, whereby the real proprietor is deprived of the knowledge of our possession, is a breach of this right. Restitution applies only to breaches of perfect rights. The rightful owner is entitled to the fruits of the thing, as well as to the thing itself. The temporary possessor is not obliged to expend labor or money upon the thing, whatever it is; unless possession be unjustly obtained, and such expenditure be essential to the preservation of it. The natural produce of the thing, arising without labor or money, belongs to the true proprietor. Such natural produce as the expenditure of labor or money, or the use of animals, gives rise to, is also the owner's property, subject to the repayment of the value bestowed by the temporary possessor (*b*). The owner's right is only to his property, and its natural advantages: the obligation of the possessor, therefore, is limited to the observance of such right. An honest possessor is not obliged to pay the value of a thing naturally perished,

Of restitution
of property.

(*a*) See Finch, 132.—Dr. and Stud. Dial. i. c. 8.—Bl. Com. ii. c. 17.

(*b*) See Spav. Puff. ii. p. 81, note.

consumed, or alienated; but only the fair value of the use of it. He is entitled to be repaid any reasonable expence or loss incurred in respect of its preservation, improvement, production, or restoration, and may detain it for the same (a). If he expend labor upon that which would have been consumed without it, still the thing, as well as its fruits, belongs to the original proprietor (b). He is bound not to wilfully injure the thing; but so far as he can, without labor or money, to restore it in as perfect a state as that in which he received it. He is not liable if the thing or its fruits have perished, and become useless. If he use it, he is liable to pay so much as it was fairly worth, at the time of its being so used; but not more. He is not liable for neglecting to bestow labor or expence upon it. He is not liable to restitution, if he give it away, or sell it; for then he ceases to be the possessor, and for him to restore it is impossible; but he must return the profits, if any. He may demand salvage, *i. e.* he may require to be reimbursed such expence as the owner must himself have incurred in rescuing it, at the time of its purchase (c). He cannot return it to the seller, of whom he purchased it, and demand the purchase-money, pretendedly to get rid of the obligation. If he have agreed for the purchase of it, and afterwards discover who is the right owner, before the completion of his purchase, the contract for purchase is voidable; for he then finds that its intention cannot be performed (d).

(a) See Turnb. Hein. i. sec. 313.—Spav. Puff. ii. pp. 79 and 81.

(b) See Spav. Puff. ii. p. 81.

(c) See Id. ii. p. 83.

(d) See Ruth. Inst. i. c. 19.

CHAPTER III.



OF PERSONAL RIGHTS, AND INDIVIDUAL OBLIGATIONS.

§ I. MAN cannot rescue himself from an observance of the precepts of nature.

The general rule of our duties.

The general rule of our duties is to apply our time, seriously and profitably, to obeying the will of God, the advancement of our own perfection, and the improvement of the condition of others^(a). This comprehensive rule is consistent with the plenitude of rational enjoyment.

The important consideration of the eminent superiority which we derive from our intellect, over common animals, should raise us far above grovelling notions of physical indulgence.

II. The rights of a man as to himself, may be thus divided:—

The rights of a man as to himself.

To life. This right is dated from the earliest moment of existence, even in the uterus of the mother^(b).

(a) See Cic. de Off. lib. i. c. 29.

(b) See Van Eck. Princ. Jur. p. 91.

Entirety of person (*a*).

Chastity.

Self-preservation.

Liberty, which is the power of acting as we choose, where we are not restrained by law. This right is obviously alienable.

Freedom of person, and thought.

Property.

Reputation.

An hermaphrodite is accounted of that sex which prevails (*b*); or, if that be doubtful, then it is taken to be a male (*c*).

A monster has as many of the rights of a man as he is fitted to enjoy.

Our duties
classified.

III. Our duties are:—

1. To God.

2. To ourselves (*d*)

3. To our country (*e*).

2. {
1. {

4. To our parents.

4. 5. To our wives, or husbands.

6. To our children.

7. To our brothers, sisters, and near relations.

8. To our friends.

9. To our family connexions, by marriage.

(*a*) See Puff.—Grotius.—2 Inst. 483.—Bl. Com. i. c. 1.—Bract. lib. ii. c. 5.

(*b*) See Van Eck. Princ. Jur. p. 91.

(*c*) See Tract. de Jur. Hom. Francfurt. 1614, p. 37.

(*d*) See Burlamaq. i. p. 177.

(*e*) See Virg. Æneid, book vi. ver. 823.—Cic. de Off. lib. iii. c. 10.—Turnb. Hein. ii. sec. 225.—Hook. Ecc. Pol. sec. 143.

10. To our countrymen (a).

11. To foreigners.

12. Not causelessly to injure brutes.

It is not meant by this classification, that our respective duties are not equally binding; but it is intended that we may, by means of it, discriminate, in cases of a clashing nature, which interests are the more important, and therefore claim our earlier consideration.

IV. Our duties to God are, to inform ourselves, by study and reflection, as rightly as we are able, of his existence, nature, and perfections; to fear, love, worship, and obey him; to be grateful for his inestimable benefits; to believe of him nothing inconsistent with the highest wisdom, the most comprehensive power, and the purest benevolence; to honor him with extreme reverence on all occasions, and therefore never to speak of him profanely; to believe him to be always present with us; to submit patiently to his will; to respect and conform to such writings as we have reason to believe to be the vehicle of his revelation; to promote his glory, as much as we can; to pray to him devoutly, avoiding and opposing all superstitious worship; to confide in his constant protection of us; to observe the sabbath, in honor of him, and for the rest of mankind, not superstitiously, or fanatically, but rationally, according to its object (b); not to personate him, or assume any of his eternal attributes; and, af-

Our duties to God.

(a) See Spav. Puff. ii. p. 352.

(b) See Paley, ii. book v. c. 6 and 7.—My Thought Book, pp. 138 and 325.

ter disobedience, to use all propitiating means of amendment and repentance (a).

A man's duties to himself.

V. In order that the duties of a man, as to himself, may be performed, he should, with proper humility, strive to resemble God, so nearly as it is possible. Nothing can be more acceptable to the Divinity, or more honorable to man, than to imitate the perfections of the Creator. He should instruct his mind, so far as his circumstances enable him, overcome the inordinate impulses of sense, and moderate his passions. He must also be courageous, contented, active, industrious, sober, chaste, and cleanly. He is bound so to manage his person, according to the wants of his age, that he may be as strong and healthful as rationally possible, and exercise his natural faculties in the most prudent, enduring, and efficient manner, and conformably to the ends which nature has intended; judging impartially, using his reason as the governing principle of his conduct, and recollecting that wisdom and virtue are the source of all happiness. A good man will be guilty of no act of personal injury, intemperance, or exhaustion, calculated to impair his mental or bodily faculties, or incapacitate him from the discharge of the duties enjoined by nature. He will associate with his fellow creatures, the better to provide for his wants, and advance his qualifications. He will apply the energies of his mind to noble purposes of action; for mere study, however successful, without its application to action, is of no use. He will regulate his conduct by the governing principle, that

(a) See Harl. MSS. 7159, p. 85.

that only is becoming in a man which is agreeable to his reason properly exercised. He will not fail to support the self-dignity, or rational self-esteem, sometimes called 'virtuous pride,' taught by nature, and authorised by truth; never losing sight of his personal command. He will be prepared for all the events which may happen to him. He will seek occasional retirement, for the purification of his mind, but will never submit to a gloomy state of melancholy: his placid contentment will not permit him to despond; and his misfortunes will be overcome by the exercise of virtue, calmness, and industry.

A man is not at liberty to kill himself (*a*), even to avoid the most ignominious suffering (*b*):—

Because he cannot do so, consistently with the rules of duty just laid down.

Because suicide is immediately opposed to the powerful instinct of self-preservation, which Nature has implanted in animals, from the highest to the lowest grade.

Because the excuse that we are useless to ourselves and to society is, if well founded, avoidable by our exertions.

Because it greatly injures our families.

Because, if suicidal acts were general, and might be

(*a*) See Aristot.—Paley, *i.* book *i.* c. 7.—Grove's *Mor. Phil.* *ii.* p. 277.—Blaise Pascal.—Plutarch.—Gellius.—*Civ. L. Dig.* 48. 21. 3. 4.—Plat. *Phæd.*—*Cic. Tusc. Quæst.* lib. *i.*—Andron. *Rhod.* lib. *iii.* c. 7.—Collier's *Essays*, p. 3.—Eurip. *Hecub.* Chorus.—Locke on *Gov.* book *ii.* sec. 6.—Godw. *Pol. Jus.* *i.* p. 92.—Spav. *Puff.* *i.* p. 192.—Virg. *Æneid.* *vi.* v. 434.—Montaigne. *Essais.* *liv.* *xi.*—Martial, lib. *xi.* ep. 57 & 80.—Hor. lib. *iii.* ode 3.—Lucan, lib. *xvii.* v. 104.—Montesq. *Esp. d. L.* *liv.* *xiv.* c. 12.

(*b*) See Spav. *Puff.* *ii.* p. 302.

committed with impunity, the greatest misery and depopulation would ensue to the world.

Because we have reason to believe, judging from the analogous precepts of nature, that God prohibits suicide (a).

Because some vicious passion is generally the motive.

Because the excuse that there is no particular harm resulting from the case, may as well be applied to some instances of murder.

Because it is absurd to die from the fear of dying.

Men never should, for one kind of pleasure, sacrifice many rich and more valuable sources of delight. It is their duty to love and promote truth, and to suffer for it with dignity. Truth is far more beneficial than enthusiasm; and fair discussion than capricious prejudice.

Infractions of these duties entail either the punishment immediately and naturally arising from them; or their plenary punishment by God.

Our duty to
mankind.

VI. The existence of the sublime faculty of speech proves that man is a social being, added to which, are the miserable defencelessness, and barbarous unintelligence, of a state of loneliness. Our own natural powers are insufficient for the attainment of all the happiness which we desire, and of which we are capable. We may often contribute to the good of others, without injury to ourselves. And as the assistance of others, in our scheme of self-happiness, cannot be at-

(a) See Grot.—Bract. lib. iii. c. 21.—Bl. Com. c. i.—J. Civ. Ff. 1. 5. 26.

tained without benevolence, the necessity of that duty is, even upon the most selfish principle, obvious. The conclusive consideration, that a contracted system of mere selfishness, if generally pursued, would subvert all happiness, and render us wretched beings, is sufficient to lead us to the cultivation of the general good. We cannot release ourselves from the duty of regarding the universal interests of mankind; as it arises from the circumstance of our being men, and is as obvious as our self-duty. Natural and social duty are therefore inseparably united.

Our perfect duty to mankind is founded upon the natural equality of man, which prescribes an equality of offices. This duty consists in rendering to all their due, and in doing to others, either by ourselves or our instruments, no causeless harm. This is called 'justice.' No man should injure another to benefit himself. "Do unto others, as you would that they should do unto you!" is an ever-admirable maxim, which solves most questions of doubt and difficulty; for whatever is wrong in regard to A., is wrong in regard to B., *cæteris paribus* (a). But this rule must be applied rationally. In its application, the duties of both persons should be considered (b).

There is no such thing as solid profit without honesty and right acting; for—

God has ordained justice to be agreeable to his will.

(a) See Wol. Relig. of Nat. sec. 6. 4.—Simplic. in Epict. c. 37.—Count de Cat. S. of L. pp. 22, 23.—Godw. Pol. Just. i. p. 81.

(b) See Sharrock de Off. c. 2, n. 2.—Hobbes de Civ. c. 3, sec. 26.—Turnb. Hein. ii. sec. 229.—Spav. Puff. i.

Nothing that is not agreeable to the will of God can be solidly profitable—

Therefore, what is unjust, not being agreeable to the will of God, is not solidly profitable.

The value of justice is shown by its necessity: it being found among thieves and pirates(*a*).

Our imperfect duties to men are—

To be modest in our actions and speeches. Modesty forbids the doing or speaking of those things, in public, which should be done, or talked of, only in secret.

To be grateful for all favors bestowed upon us. The duty of gratitude is regulated by the quantity of obligation bestowed, and the degree of risk incurred by its bestowment. Before we feel ourselves to be bound to return a loan of equal amount, we may consider—Whether we can lend as much with equal safety to ourselves, as the party before lent to us; and—Whether the benefit gratefully conferred, is productive of equal or greater loss to the person conferring it.

To do to others all the good in our power, consistently with our own interests. This is termed ‘benevolence,’ which is shown by a general feeling of kindness; by mercy, pity, forgiveness, generosity, judicious bounty, patience, affability, which has an inexpressible influence on all; curtesy, and the dissemination of truth. For a man causelessly to lessen the happiness of another, is to assume a superiority and dominion over him.

To honor old age(*b*).

(*a*) See Cic. Off. lib. ii. c. 11.

(*b*) See Id. lib. i. c. 41.

To bury the dead. It is not decent that a being bearing our image, should be exposed as a prey to the birds and beasts (*a*).

All these duties should be dispensed with prudence, and apportioned to our own and others' necessity. Although we are thus bound to assist each other, yet our duty to ourselves and to our friends, and instances of injustice and ingratitude, will often prudently restrain our benevolence. In doing kindness to some, we should not commit injustice to others.

We are not obliged to love others better than ourselves. A man may therefore save his own life at the expense of another's (*b*).

VII. We have a right to use creatures, and inanimate things (*c*), for the purposes of life and rational enjoyment.

Our right to
creatures and
inanimate
things.

Our right to use living creatures for food, is founded on the following reasons:—

They cannot be the subject of common right and obligation with us; for they are not rational creatures (*d*). A kind of war, therefore, exists between us and them. If they were all permitted to live, we could not. It is better for us to kill them, than that they should seriously annoy us (*e*). Their nature shows the will of the Deity, that we should so use them.

(*a*) See Harl. MSS. 5254, p. 359.—Grot. book ii. c. 19.—Quintil. Declam. 6.—Plut. Lycurgus.—Demosth. in Timocrat.

(*b*) See Turnb. Hein. i. sec. 149.—Albertus Comp. Jur. Nat. Orthod. Conform. c. 3, sec. 17.

(*c*) See Spav. Puff. i. p. 124, and ii. c. 3.

(*d*) See Count de Cat. S. of L. p. 89.

(*e*) See Hobbes.—Harl. MSS. 1325, p. 207.

Our right to use vegetable and inanimate substances, in a reasonable manner, will not be disputed.

Of personal liberty.

VIII. Liberty is the power of moral discretion which we have over our persons and conduct, consistently with the interests of mankind. In estimating liberty, it should be recollected that we are all mutually dependent on each other for the comforts of life.

CHAPTER IV.

OF MARRIAGE.

§ I. MARRIAGE is a contract, in words of present time, between a man and a woman, having natural power to intermarry, whereby they mutually and voluntarily agree to surrender, for life, the person of each other, for the sake of reciprocal happiness, and the production and education of children.

Definition
and nature of
it.

There are no marriages in words of future time, although, by the confusion of ideas and language, engagements or promises to marry are often so called.

Women should marry sooner than men; as they attain maturity earlier (*a*).

II. Unnatural marriages are with lineal descendants (*b*), eunuchs, and persons incurably barren, or certainly too old to produce children (*c*). The two last disabilities have been disputed (*d*); but the obvious rea-

What marriages are void
and voidable.

(*a*) See Tract de Jur. Hom. p. 37.

(*b*) See ch. v. sec. 4.

(*c*) See Plutarch of Love, and Life of Solon.

(*d*) See Spav. Puff.

son on which the second objection is founded, equally applies to them.

Marriages are void :—

Which are unnatural, or incestuous (a).

Where the parties are, or one of them is, under age, idiotic, or lunatic, not having power to give consent to the contract.

When a previous marriage between one of the parties still exists; for a person previously married has no right to dispose of his or her person.

When unjust fear, force, or fraud is the foundation of the marriage; if, so soon as it is discovered, the party imposed on disclaim the union.

Voidable marriages are—

In cases of physical incompetency to beget children, which is the very reason and end of the contract.

And of adultery, on the claim of the injured party, who is not bound to a contract which the other will not keep; but if the aggrieved party receive back the other, it is a waiver of the remedy.

And of violent ill-usage, which is contrary to the bargain of the parties; but as ill-usage would very frequently occur if it were permitted to be the ground of complete dissolution, the parties can, for this cause, be separated only from bed and board; so as to secure to the injured party protection from misery.

Where either party, by the voluntary commission of crime, causes himself or herself to be banished from the land, by which he or she becomes totally unable to perform his or her marriage contract; for it is not

(a) See ch. v. sec. 4.

intended that a party shall possess a right, who cannot perform the obligation.

Where either so acts, that the end of marriage cannot be attained (*a*).

III. The law of nature enjoins no other form of marriage, than that the nuptial vow shall be expressed by each party in clear terms (*b*). Form of marriage.

Marriage by proxy (*c*) amounts but to an imperfect engagement, unless followed by consummation.

IV. The rights of the husband over the wife are, to her person, and therefore to inviolable chastity; for nothing can be a greater breach of the marriage contract, than conjugal infidelity; and when it exists on the part of the woman, it tends miserably to disturb the peace of the family. He is also entitled to her constant cohabitation (*d*), and to her conjugal affection, that is: the pursuing all honest and practicable means for the promotion of his rational enjoyment; for upon her his happiness must principally depend. She should submit to his authority, in lawful matters, upon the fairly presumed consideration of his superior knowledge, experience, and discretion. Contentions would be endless, if neither had the power of determining them (*e*). She has agreed to promote their reciprocal happiness, which is best preserved, by confiding to him Husband's rights and authority.

(*a*) See Turnb. Hein. ii. sec. 48.

(*b*) See Id. ii. sec. 49.—Spav. Puff. ii. p. 155.

(*c*) See Ward, ii. p. 251.—Mod. Un. Hist. 17. 209.

(*d*) See Spav. Puff. ii. p. 150.

(*e*) See Turnb. Hein. ii. sec. 44.—Grot. book ii. c. 5.—Plut. Conjug. Prec.—Spav. Puff. ii. p. 150.—Locke on Gov. book ii. sec. 82.—Montesq. Esp. d. L. liv. xxvi. c. 14.—Tract. de Jur. Hom. Francf. 1614, p. 91.

that which he will the better manage. Every family must have a superior, and Nature points to the husband as the person whose generally-superior strength and natural confidence and offices qualify him the better for the prerogative of that situation (*a*). But that prerogative ought never to be used as the means of her unhappiness or disgrace. And the husband may, before marriage, renounce it, in favor of the wife (*b*). It is the wife's duty to render to the husband her best assistance in the maintenance and education of their children. The husband has the usufruct of her property, during the existence of the marriage, subject to her comfortable support.

Wife's rights. V. The rights due from the husband to the wife, are, to his person, and therefore to strict chastity. For although the evils of male infidelity are not so dreadful, the wife has as much exclusive right to the husband's person, as the husband has to that of the wife. Adultery is founded on a disregard of the nuptial contract; and produces a fatal train of cruelties and anti-social evils. He is bound to bestow upon her constant cohabitation, and cherish her with conjugal tenderness. In proportion to the degree of conjugal affection between men and their wives, is the happiness of themselves, their families, and their dependents. He should

(*a*) See Fleetw. Rel. Dut. Disc. 7.—Wol. Relig. of Nat. sec. 8. 4.—Montesq. Esp. d. L. liv. vii. c. 17.—Harl. MSS. 1325, p. 212.—Ruth. Inst. i. p. 369.—Plut. Conj. Pr. p. 139.—Mart. Epig. 8. 12.—Cæs. de Bel. Gal. 6. 19. Tac. de Mor. Germ. c. 19.—Tac. Ann. 5. 1. & 13. 32.—Dio. Cas. Hist. lib. xlviii. p. 384.

(*b*) See Turnb. Hein. ii. sec. 46.—Aristot. Pol. 5. 11.—Sophoc. Œdip. Colon. v. 354.—Diod. Sic. Bibl. i. 27.—Buchanan. Rer. Scot. Hist. lib. xvi. p. 674.—Herodot. lib. ii. sec. 35, and Beloe's Notes on ditto.—Palthenius.

submit to her management, when her discretion and judgment are manifestly superior to his(a); otherwise their mutual comfort must be neglected. He should not fail to render to her his best assistance in the maintenance and education of their children; to support her as comfortably as his power will permit; and to provide, so far as he can, for her comforts, after his death, in case she should survive him (b).

VI. The law of nature does not permit divorce(c), Of divorce. excepting upon some of the grounds of voidability stated in the second section. If mutual consent were allowed to operate as a legal reason for separation, the greatest inconveniences would occur. Providence, for very wise reasons, enforces the perpetuity of the marriage contract(d). It is impossible that there can be that security for reciprocal comfort, if the dissolution of the marriage-engagement be discretionary with the parties; for the prospect of that dissolution will always be uppermost in the minds of dissatisfied individuals, and induce such conduct as will compel the other to consent to a separation. The very important work of the education of children cannot be properly conducted, if the parties have the power of respectively consenting to the termination of the matrimonial connexion.

It is true, that with the restriction of perpetuity,

(a) See Ruth. Inst. i. p. 369.

(b) See Fleetw. Rel. Dut. Disc. 12.

(c) See Milton on Divorce.—Les Cinq Codes, Code Civ. *du Divorce*.—Bl. Com. i. c. 15.—Ward's L. of Nations, ii. p. 256, note.

(d) See Larcher's Note on Herodot. lib. viii. sec. 45.—Spav. Puff. ii. p. 151.—Turnb. Hein. ii. sec. 48.

marriage will often produce uneasiness; but this is a natural misfortune. It is better that thousands of married people should be unhappy, than that millions should have the inducement given to them by law, of rendering each other miserable. And it will be observed, that the restriction which the nuptial contract imposes, is known beforehand to the parties who marry, 'for better, for worse.' They cannot, therefore, complain that the law takes them by surprise. And natural law, which renders the engagement perpetual, does not allow them, by any private agreement, to subject it to discretionary dissolution.

CHAPTER V.

OF POLYGAMY, CONCUBINAGE, INCEST, &c.

§ I. POLYGAMY^(a) is clearly inconsistent with Of Polygamy.
the right which each marrying party gives to the other
over his or her person. It is also inconsistent with the
end of marriage—the undivided and diligent maintenance
and education of children. It is therefore usually
absurd in itself; and it is contrary to the general
law of nature, which renders the observance of a contract
equally binding on each contracting party.

The advantages of marriage are: its aptitude to nature,
one being sufficient for one; the generation of the
greatest possible number of healthy children; and rearing
of them by their parents who are certain; for the
continuation of the species is as important as its pro-
creation; their education and provision during minority,
with the concurrent assistance of the two parents,
who are enabled thereby to lay up and provide the
stores of maintenance and protection; the controlling

(a) See Spirit of Nations, book iii. c. 3.—Reflect. on Polyg. by Phileleuth.
—Ammian. Marcell. lib. xxiii. c. 6.—Derham's Phys. Theol. book iv. c. 10.—
Grove's Mor. Phil. ii. p. 472.—Turnb. Hein. ii. sec. 35 to 39.—Aristot. Pol.
2. 2.—Beza de Polygamia.—Herodot. lib. iv. 172.—Ruth. Inst. i. p. 341.

of licentious passions; the avoiding disputes between men as to cohabitation with women, jealousy being a naturally-sexual feeling of mankind; the comforts of mankind, particularly the female portion of it; the union of interests; the distribution of society into small communities, governed by different influential heads; the incitement to parental industry; and the identity of parentage.

In proportion to the value and importance of these advantages, is polygamy to be condemned.

But as regard must always be had to the end of every institution, and as Nature cannot be supposed to supersede or contradict her own ordinances, polygamy is obviously tolerable and lawful in those countries in which a great majority of either sex prevails, and has prevailed for a considerable time, without a probability of alteration. Temporary and accidental circumstances, however, owing to contingent events, are not to be taken as declaratory of the positive laws of nature. The lawfulness of polygamy, under any circumstances, has been questioned; but if the relative proportion of the sexes in a country be as three to one, I know not how the laws of nature can be construed as depriving the exceeding two-thirds of connubial enjoyment.

Nothing, however, but circumstances of an extremely unusual character can justify a woman's connexion with several men (*a*).

Of Concubinage.

II. The state of concubinage, in which a man and a woman live together, without reciprocal obligations of

(*a*) See Spav. Puff. ii. p. 150.

perpetual fidelity, is contrary to the law of nature, which abhors promiscuous connexions of the sexes. The pretence that all the purposes of marriage are attained by cohabitation, without any vow or ceremony, is easily answered by the question:—"If so, why do the parties object to marry (a)?"

III. Promiscuous intercourse should be avoided as much as possible; as it is contrary to the reproductive ends of nature, to the comfort and education of children, and to the happiness of the female sex. It also perpetuates a dreadful disease. The fearful evil of children not being identified by their parents, is an overpowering argument against this loose kind of connexion.

Of promiscuous intercourse.

IV. Incest is the sexual conjunction of parents and children, brothers and sisters, and other near relations, and those who generally form members of the same family. Nature does not peremptorily enforce other restrictions.

Of incest.

Incestuous marriages are between—

1. Parents and children, grand-parents and grandchildren, and so on; for nature recoils at unions inconsistent with the filial reverence which she enjoins (b).

2. Brothers and sisters; not because they are essentially unnatural, but because, from obvious reasons of expediency, this has become an universal rule of civi-

(a) See Paley.

(b) See Sophoc. *Œdip.*—Turnb. Hein. ii. sec. 40.—Civ. L. 38. sec. 2. D. ad Leg. Jul. de Adult. and L. 68. D. de Ritu Nupt.—Spav. Puff. ii. p. 154, note.

lised society (a). Those reasons are—1. The general freedom of intercourse which exists between children of the same parents, and renders a complete bar of restraint necessary: and 2. The requisite freedom of choice in marriage, which would be much limited if parents could insist upon fraternal unions, having their children within their control and power: and 3. The family discord which rejection on either side would produce.

3. Nephews and nieces, and aunts and uncles, to which the above principles will, in a degree, apply; in addition to the disparity of age generally existing between such relatives.

4. Sometimes between step-parents and step-children. In proportion as the relation and circumstances of a step-parent's connexion approaches to that of the real parent, is this kind of marriage to be avoided. The parental image has sometimes nearly the same effect as the reality. But inexpedient as it may be, it is not unnatural.

Of Defile-
ment.

V. The man of reason needs no detailed exposition of the wickedness and mischief of all kinds of anti-generative pollution, contrary to the wise designs of Nature.

(c) See Tyr. L. of Nat. c. 4, sec. 18.—Bl. Com. i. c. 15.—Burn's Eccl. Law, title *Marriage*.

CHAPTER VI.



OF PARENTS AND CHILDREN.

§ 1. The duties of parents (a) are founded upon love, and are— The duties of parents.

1. To rear children whom they have generated, with tender kindness, undespotic firmness, and cautious wisdom; for they must be more concerned in them than others; and this is a duty which Nature obviously teaches. If their parents do not rear them, they must perish immediately upon their birth, and if they do not virtuously educate them, they cannot be happy, as God wills that they should be. This duty is not released by any personal qualities, or religious opinions of the children. It lasts so long as their offspring are under the age of discretion, and are unable to gain their own support. It is the highest happiness of good parents to cause their children to imbibe habits beneficial to themselves, and to society. It is cruel, by disinherison, to deprive them of sustenance, whilst they are

(a) See Bl. Com. i. c. 76.—Chitty's Notes on ditto.—Montesq. Sp. L. book xxiii. c. 2.—Les Cinq Codes, *de la Puissance Paternelle*.—Pott. Ant. book i. c. 26.—Wol. Relig. of Nat. sec. 8.—Turnb. Hein. ii. c. 3.—Seneca's Morals.—Grove's Mor. Phil. ii. c. 16.—Ruth, Inst. i. p. 159.—Grot. book ii. c. 5.

unable to provide for themselves. To be patterns of goodness for filial imitation, is the climax of parental virtue. Mothers are bound to suckle their children, if physically capable (*a*).

Parents have no right—

1. To the sexual love of their children.
2. To the absolute disposal of their persons.
3. To order them to do what is unlawful.
4. To be cruel to them (*b*).
5. To insist upon their entering into a profession to which they have an invincible dislike, or for which they are by no means fitted.
6. To thwart them in a deep-rooted and virtuous love-attachment, so as to injure their health, or destroy their happiness.
7. To force celibacy, marriage, or sectarian religion upon them (*c*), for these are things which their children have a natural right to choose; and for the parents to possess such a power, would tend to the highest injury.

The rights of
parents.

II. The above duties cannot be performed without the means of parental authority, which consist of the following rights of discipline:

A right to the child's rational obedience in all things (*d*), founded on the parental relation, until it arrives at the exercise of proper reason; and to give it advice, as to marriage and every thing else, after it has attained a discretionary judgment.

(*a*) See Turnb. Hein. ii.

(*b*) See Bynk. de Jur. Occid.

(*c*) See Bp. Fleetw. Rel. Dut. Disc. i.

(*d*) See Bl. Com. i. c. 16.

To correct it, so far as the ends proposed render it necessary; but this qualification of punishment excludes extinction of life, maiming of person, and cruelty.

During its progression to reason, to consent or object to contracts, for the infant's benefit; and to the rational usufruct of its fortune and labor, to be spent in its maintenance.

To lasting love and gratitude, founded upon a sense of parental kindness and sacrifices, received, and to be received; and to the doing of such actions as are beneficial to themselves and their parents. Their children are under an obligation, if it be in their power, to provide for their parents' comfortable support, when in want of it; for their children owe life to their instrumentality, although that instrumentality is of an accidental character. Another duty which they owe is continual rational respect. To insult a parent, is wrong in the consideration of all impartial men. To kill a parent wilfully, is an enormously ungrateful crime.

To the observance, after it has attained full reason, of such authority as it has voluntarily consented to bestow on the parents, as the heads of the family; but this is rather political(*a*), than filial obedience.

III. The rights and duties of children are correlative with the above-stated obligations and rights of parents. Children have a right to the regulation of their actions, after they have attained the mature use of intellect(*b*). Perpetual, despotic, and unlimited

Rights and
duties of chil-
dren.

(*a*) See Turnb. Hein. ii. c. 4.—Aristot. Pol. 3. 6.—Hob. Lev. c. 20.—Wolff de Vita. Soc. Hom.

(*b*) See Hook. Eccl. Pol. i. sec. 6 & 7.

obedience is contrary to reason. The consequences of the child's conduct, after it possesses full reason, as well in this life, as in the life to come, fall upon itself; and it is therefore the natural judge of its actions.

Period of natural minority.

IV. Human beings are so differently constituted, and so variously placed, that there can be no precise general period of natural minority(*a*). They arrive at maturity, when they have the full use of their reason.

Authority of father & mother compared.

V. There is some difference in the extent, but none in the nature, of the authority of a married father and mother. As the wife submits to the husband, the father should be obeyed rather than the mother, where, unfortunately, one must be disobeyed(*b*). In proportion as his natural superiority of sex renders him able to protect, support, and instruct his children better than his wife, is his authority superior to her's, unless he have waived it in favor of his wife. It would be dangerous to argue that the female is sometimes better qualified to accomplish those purposes than the male. This would let in conjecture and caprice against natural probabilities. But a child is bound to obey a sane mother, rather than an insane father, for that is a case of natural certainty. On the decease of the father, the mother has the complete parental control.

(*a*) See Tract. de Jur. Hom. 1614, p. 66.

(*b*) See Turnb. Hein. ii. sec. 43.—Paley, i. book iii. part 3, c. 10.—Fleetw. Rel. Dut. Disc. vii.—Ruth. Inst. i. c. 11.

The mother, as the more certain parent, has the greater right to children born out of marriage.

VI. A child may be disposed of, and a parent's rights transferred by sale(*a*), or adoption(*b*). Sale and adoption of children.

Parents who are absolutely without the means of sustaining their children, may sell them, subject to restoration(*c*). Otherwise they would starve, which the law of nature never intended. The purchaser undertakes the parental duty. The child therefore is liable to the performance of filial obligations to him.

Parents may part with their children to those who parentally adopt them; provided it is for the child's benefit(*c*). This right is founded, not upon that of transfer, but upon the child's consent, which is inferred, as well from the presumption that it would not object to an act done for its benefit, as from the right of the parent to consent for it. But if the child be of a reasoning age, its assent must be expressed. The same duties are due to an adopting parent as to a natural one(*d*), so that similar duties may be performed by it.

(*a*) See Ruth. Inst. i. p. 167.

(*b*) See Locke on Gov. book i. c. 6, and book ii. sec. 65.—Herodot. lib. vi. sec. 57.—Beloe.—Ruth. Inst. i. p. 168.

(*c*) See Spav. Puff. ii. p. 167.—Ruth. Inst.

(*d*) See Spav. Puff. ii. p. 158.

CHAPTER VII.

OF GUARDIANS AND WARDS.

Definition
and nature of
guardian's of-
fice.

§ I. GUARDIANS(*a*) are the persons entrusted by deceased parents with the care of children, or their estates, until their majority.

The law of nature recognises guardianship, as essential to provision for the physical and intellectual wants of young persons, after the death of both their parents.

Rights & du-
ties of guardi-
ans.

II. Guardians are entitled to all the subjection of their wards necessary to the proper administration of the guardianship.

They are bound, if they undertake the office, to watch faithfully and diligently over the morals, health, or estate of the ward; as the case may be.

Rights of
wards.

III. Wards are entitled to kindness, attention, and fidelity, from their guarding protectors.

(*a*) See Code Nap. book i. tit. 10, sec. 7.—LL. xii. Tab.—Bl. Com. i. c. 17.—Pott. Ant. book i. c. 26.—Laws of Charondas. Petit. Leg. At lib. vi. t. 7.—1 Co. Inst. 88.—Com. Dig. *Guardian*.—Bingham on Infancy.—Bac. Abr. *Guardian* and *Infancy*.—Montesq. Esp. d. L. liv. vii. c. 12.

IV. Persons naturally incompetent to be, or to continue, guardians of children, are—

Persons incompetent to be or remain guardians.

Minors, idiots, and lunatics.

Those who have been guilty of very shameful or atrocious acts; who have shown a high degree of ill-will towards their own children; or who are grossly untrustworthy; or who, having acted as guardians, have wilfully, injuriously, and unrepentingly neglected their duty.

They who, being or going abroad, cannot properly superintend the bringing up of the wards at home.

Those whose personal interest it clearly is, that the wards should die; or who have a serious and still-litigated cause of contention with them.

CHAPTER VIII.



OF PROMISES.

Definition
and nature of
promises.

§ I. A PROMISE is a declaration of our intention to bestow upon another some gift or service, by which we voluntarily excite his expectation, and contract with him an obligation of performance (*a*).

Promises should be verbal or written, unless physical incapacity prevent us from speaking or subscribing. Silence, being a negative act, can scarcely show the mind's complete consent. But if there be a peculiar reason why we should speak if we did not consent, the assent may be fairly implied. Nods and shrugs are, however, to be construed as consenting signs in some countries, from their sufficiency and universality of significance.

Promises are of two kinds—perfect and imperfect. A perfect promise is a positive declaration that we actually will do or give something for or to another, implying our surrender of liberty, and our design that he shall have a right to demand the absolute fulfilment of the promise.

(*a*) See Dr. Cockman's note on Cic. Off. book i. c. 7.—Paley, i. book iii. part i. c. 5.—Godw. Pol. Just. i. p. 150.—Ruth. Inst. i. p. 170.

An imperfect promise is a promise which the promisee cannot insist upon the promiser's performing, as of right, but which a prudent man will not revoke, if he can avoid it. Thus, if I say to A.:—‘It is my intention to give you, on your next birth day, this ring which is upon my finger,’ the promise is not complete, but merely declaratory of my intention to make the gift. For there is manifestly left to me a right to alter my intention. If to such declaration I add:—‘And I shall not alter my intention,’ this renders the imperfect promise of a more serious character. But as promises of this kind are evidently revocable, or subject to the will of the promiser, there can be no perfect right in the promisee. Yet a good man will never precipitately raise expectations, and afterwards disappoint them; for this is not doing as he would be done by. Nor will he incautiously make imprudent declarations, the breaking of which may subject his character to the imputation of levity. The fact, that the promisee should not have positively construed that which was only conditional, cannot excuse the thoughtless encourager of hope.

Promises of giving and of doing, being both alienations of liberty, and restraining the maker to particular acts, are of the same original nature.

Promises always imply a present intention, and a future performance. They also necessarily involve an obligation upon the promiser, and a right in the promisee.

II. Acceptance, tacit, or openly avowed, is necessary to render a promise binding; for there cannot be a right of demand, without the previous consent of the promisee.

Acceptance,
effect, and in-
terpretation
of promises.

Unaccepted promises are therefore revocable. But previous, is as valid as subsequent, acceptance. The promiser, out of prudence, should not lightly recal his promise, before acceptance.

In the interpretation of promises, we are to attend to the true and natural design of them. They are to be taken in the sense expressed by the promiser, according to a fair and rational construction. The rules to be hereafter (a) laid down, for the interpretation of laws, will sometimes be found applicable also to that of promises.

Of promises
not binding,
and in sus-
pence; and of
conditional
and rash ones.

III. Promises not binding are—

Of infants, idiots, and lunatics; who, not having understanding to direct their choice, cannot have liberty to promise for themselves.

Promises extorted by unjust fear, deceit, or fraud, by the promisee himself; for an unjust act is void, and cannot confer a right. Such fear must be of an injury or punishment which the promisee has no legal right to inflict. This exception does not include threats of penalties for not performing that which, without them, we are bound to perform.

Promises expressly founded upon the manifest supposition of facts which do not exist; for our consent is conditional only, upon the faith of the truth of the facts. There are two tests by which the invalidity of a promise on this ground may be tried:—1. If rightly informed, we would not have made the promise.—2. The supposition, or mental condition, must, from the nature of the thing, plainly appear.

(a) See book ii. c. 5, sec. 2.

And as we can alienate only our liberty, and that liberty gives us no right to break the law, there are certain promises which we ought never to make, but which having made, we cannot be morally called upon to perform. Of such a kind are promises to do what is impossible or unlawful. We cannot have the liberty of doing that which is impossible. But we are guilty of fraud, if we deceptively promise what we know to be impossible of performance. Our liberty does not authorise us to break through the restraints of the law. Promises, therefore, to do those things which the law of God, or the valid law of man, restrains us from, can raise no obligation. In this class may be mentioned such promises as cannot be performed without a man's neglecting a more important duty to mankind: as if he promise to assist another, but it afterwards occur that he cannot do so, without greatly neglecting his duty to his country, or children, or wife, he is not bound by his promise. I may also include those promises, the performance of which would inevitably bring mischief upon the promisee; for we cannot perform them consistently with our general duty of benefiting mankind. And it is fairly to be inferred, that the promiser would not have made the promise, had he contemplated the impending damage. We are not bound by promises which have been voluntarily released by the promisee.

We have not the moral power to make promises contrary to former ones. Where we have given up our liberty of acting, we cannot transfer that liberty to a second person; for it is not ours to give. Promises of these kinds produce no obligation, and therefore confer no correlative right. But if, by any lawful act of ours, we can rescue a promise from what may be termed the

suspense of invalidity, the objection to perform it, on either of the above grounds, would not be real, but a pretence. If we bind ourselves to the end, we must necessarily oblige ourselves also to the means.

The doctrine of Cicero, that such promises as do more damage to the promiser than good to the promisee, are not to be kept (*a*), (because, as I suppose he meant, it is to be presumed, that the promiser would not have so promised, had he contemplated the evil,) will not bear analysis.

Change of personal circumstances or feelings cannot render positive promises of no effect; for if so, no promises would be binding. If the promiser may, without the consent of the promisee, change his mind, the promise is imperfect. But where a condition, as—‘ If I be in England;’ or, ‘ If I have the use of all my limbs;’ or, ‘ If I be a bachelor;’ or, ‘ If you be married;’ is annexed to the promise, that condition is as obligatory as the promise itself is. But conditions must not be implied, the presumption being, that, had they been intended, they would have been expressed.

Rash promises are binding, because every moral agent is supposed to deliberate before he promises, and if he do not, it is his own fault. But where, if such an event be possible, he obviously did not deliberate at all, I am inclined to think that the promise must be construed as not having the necessary qualification of voluntary concession.

Promises of
agents and
messengers.

IV. If we commission an agent to make promises for us, we recognise his acts for our own, and must ob-

(a) See Cic. Off. lib. i. c. 10, and lib. iii. c. 24 & 25.—Grot.—Puff.

serve them. We stand in his place. He stands in ours. The extent of the agency must appear from the appointment, not from private instructions; to prevent mistake and collusion. A man is not bound to guess at a concealed intention. But the agent himself who is made acquainted with our will, and who, by accepting the agency, undertakes to follow it, if he infringe upon it, is responsible for our loss. To constitute an agent, there must be an express appointment, or recognition of agency. But if a man by letter constitute 'the bearer' of it, without naming him, his agent, this, as a proof of his intention, binds him to the promises of the person who delivers it to the promisee, unless it plainly appear that it could not be the person delivering it.

A mere messenger to notify a promise, is not an agent to make one. Revocation, therefore, before acceptance, is valid. For, up to the instant of acceptance, there is a power to revoke. But the actuality of the revocation must be made to appear to others, before acceptance. A mere internal intention to revoke, cannot be known to others, any more than if it did not exist.

A revocation of a promise which an agent is authorised to make, must be communicated to him before acceptance, to discharge his authority. An agent has no power to act, after his authority is determined by revocation.

An agent's acts are not binding after the nominor's death; for, as he cannot then act for himself, no one can act for him.

A promise made to A., as agent for B., and that declared to A. merely as a witness of what we promise

to B., are rather different. The former may be released by A. before acceptance of B., but not afterwards, and B.'s refusal to accept, discharges the promiser. The latter promise may be publicly revoked by the maker at any time before B.'s acceptance; but not subsequently. But if the promiser agree that the acceptance of A., although he be a stranger to B., shall be binding, until B.'s will be declared, then the promise is made obligatory, upon the principle of good faith.

On the non-obligation of promises on promisers' heirs, and acceptance of promises by heirs.

V. A promise, being a merely personal obligation, does not bind a man's heirs or next of kin.

A man's heirs and next of kin, as they cannot accept a personal promise for him, have no authority to insist upon the performance of one made simply to the ancestor before his death. If they be included, their acceptance is for themselves. An intention to do an act, or give a thing to an individual, does not essentially imply an intention to do it for, or give it to, his descendants or relatives.

Promissory notes are, as positive evidences of debts, binding against the deceased's estate, unless, by other evidence equally positive, it appear that they were given, not evidentially, but in the nature of accommodation or loan, to the payee.

CHAPTER IX.



OF CONTRACTS.

§ I. CONTRACTS^(a) are necessary to enlarge human happiness. They are such voluntary acts, made for equivalent consideration, as produce mutual obligations between the parties making them, or to do, or not to do something. In this respect they differ from promises, which involve only a right on one side, and an obligation on the other.

Definition &
nature of con-
tracts.

Contracts may be classed in the following generic order :—

1. Of immediate performance.
2. Of future performance.
3. Of mutual benefit.
4. Of partial benefit.
5. Of giving.
6. Of doing.
7. Of giving and doing.
8. Of not giving, or not doing.
9. Of simple, or of mixed kinds.

(a) See Les Cinq Codes, Code Civil, liv. iii. tit. 3. 1101.—Grot. book ii. c. 12.—Turnb. Hein. sec. 327.—Ruth. Inst.—Pothier des Contrats.—Ruth. Inst. i. p. 203.

Effect, interpretation, and dissolution of them.

II. By a contract, we do not part with more than we thereby intended. This intention must appear, not from our private design, but from our words or actions.

Contracts are to be construed according to good faith, the fairly deducible intentions and expectations of the several parties to them (*a*), and mercantile custom.

They are dissoluble—

By mutual concurrence, if naturally permitted. But marriage is an indissoluble contract; even if both parties consent.

By the infraction of the agreement, by either party.

By natural and necessary consequence.

By the expiration of previously-limited time.

By death, if personal.

Right attending them.

III. The right which contracts convey, is to their full performance, according to their rational construction.

Of void contracts.

IV. Some contracts are void: others are voidable.

They are void:—

When made with minors, idiots, or lunatics; and when the party contracting has not, at the time of making of the contract, the use of understanding.

When made under the immediate influence of unjust force or fear, or under gross error.

When obviously made in jest, or with parties incapable of contracting; or without any equivalency or

(*a*) See book ii. c. 5, sec. 2.

consideration; or when we engage to do or to give a thing, in consideration of something which we might previously claim.

Where the matter contracted to be done is unlawful(*a*), or impossible, or injurious to the contractee. There being no obligation on a contractor, to do that which the law forbids, or which cannot be done, there can be no right in the contractee to demand its performance.

But if, after these obstacles are removed, we adopt the contract, either by manifest acquiescence, or by open declaration, we are bound by it. And as no man can take advantage of his own wrong, a wrongful contractor cannot of himself dissolve a contract on the ground of his own fraud or force. We are bound to pay to a person, whom we have hired to do an unlawful act, the reward promised for it when it is done(*b*).

The breach of one contracting party in fulfilling the contract, does not annul it. It is optional with the other, whether he will waive the default, and still insist upon the future performance of the agreement.

Contracts may be entered into by proxy.

V. Commissions (*c*) for another person are of two sorts:—

Of commission or agency.

To do business as agent.

To take care of goods.

The distinction of gratuitous and paid-for agency

(*a*) See Papinianus, lib. xv. de Condit. Inst.

(*b*) See Paley.—Grot. de J. B. et P. lib. ii. c. 11. sec. 9.—Grove's Mor. Phil. ii. p. 439.—Spav. Puff. i. pp. 319 & 326.

(*c*) See c. viii. sec. 4.

seems unimportant, as the following rules apply to both:—Agents are bound to use the same diligence, as if the business were their own. The act of their being trusted, shows the intention of the nominors, that they should observe this rule. They are also bound to follow their principals' instructions. They are liable for all loss incurred through their neglect. They are to be presumed, in cases of doubt, to have done the best they could for their principals. They are entitled to be repaid their expenses, but not any actual loss sustained in their own affairs through their agency, unless the principals have impliedly or openly bargained to protect them against it.

In cases of custody of goods, they are to be as careful of preserving their principals' goods, as they would be, in taking care of their own of equal value. They are not to use them, without the owners' permission, expressed, or clearly implied. The principals are bound to repay all expenses necessarily incurred in guarding, preserving, or keeping them from decay, if such necessity do not arise from the agents' own acts.

Of trusts.

VI. It is the duty of a trustee for the preservation of another's interests, to be as diligent in the affairs of his *cestui que trust*, or person beneficially entitled, as in his own, and equally to consult his advantage. His trust should not be turned to the damage of the person who confides in him. He is bound not to withhold the thing entrusted, after the time of trusteeship is determined; unless it be manifestly unjust or cruel to return it, as, if it be stolen, or immediately intended as an engine of immoral destruction.

The obligations on a *cestui que trust* are, to repay

to the trustee, all reasonable expenses incurred in respect of the trusteeship; to render the trouble of it as light as possible, by undertaking such part of the labor as is consistent with his situation, and agreeable to the trustee, if the trusts be performed gratuitously, and not to hinder the performance of the trusts.

Trustees are necessarily entitled to an exercise of discretion.

There is a distinction between stealing and a breach of trust. Stealing is taking away the property of another, by fraud, or force. Breach of trust is the breaking confidence reposed. Property originally acquired with the consent of the proprietor, is not stolen, if detained. The trustee often has a just lien upon the property. He has always a proprietorship in it. He who perverts confidence, to the mischief, instead of applying it to the benefit, of the parties equitably entitled, is, however, but a grade below a thief.

VII. Equivalency and knowledge of value are essential to the validity of all contracts for mutual benefit. For we cannot design to part with a thing to a stranger, for less than its price, or without a proper equivalent. If the supposed equivalency do not really exist, the condition on which the contract is made, is void. It is, therefore, the duty of a contractor not to designedly conceal any fault in the thing contracted for, from the contractee, but to let him have the free use of his judgment; otherwise the value cannot be known; but if the faults be known to both parties, there is an equality of knowledge, and the contract is fair. The same principle, as to conceal-

Of equivalency, and knowledge of value.

ment of real value, will apply to the purchaser, as to the seller.

Similar reasoning will hold as to contracts between buyer and seller, when there exist faults or excellencies unknown to both parties, at the time of sale.

But contracts made clearly at open risk, are always binding upon the parties, however pretendedly disadvantageous to either of them.

Of auctions.

VIII. Want of equivalency, or ignorance of value, will not be an objection to a contract for sale by auction, at which the party buys 'for better, for worse,'—at which the seller avowedly gets all that he can—and at which the buyer sets as low a price upon the article as he can.

He who bids the most at an auction, is entitled to the thing put up.

*Of bartering
& exchange.*

IX. Bartering is a most ancient kind of contract, by which things are parted with, in exchange for others of equal worth. Since the introduction of money, it is very like buying and selling, as goods of all sorts generally have a ready market for money, which represents and purchases all our wants. Before its introduction, the different necessities of persons rendered barter very fluctuating. The value of goods, even in cases of bartering, is now measured by the common standard of money.

Exchange is somewhat similar to bartering, and is of three kinds:—

Exchange of houses or lands, for other houses or lands.

Exchange of money, where money of one kind, or at one place, is given in exchange for money of another kind, or at another place.

Usufructuary exchange, which is the use of some visible things, for the use of other visible things.

In these cases, each party has a personal demand upon the other, for the performance of such obligations as the contract involves.

X. The price of a thing is its value at the time of ^{of prices.} sale.

Things are cheap or dear, in proportion to:

The necessity existing for them.

Their usefulness.

The quantity of them to be had.

The labor and money expended upon them.

The danger incurred in acquiring them.

Their excellence.

The number of buyers.

The credit given.

The plenty or scarcity of money.

XI. Gifts are necessarily founded upon liberal feel- ^{of gifts.} ings. They are, when delivery has passed, absolute, and irrevocable, excepting when given by the operation of fraud, force, fear, or error; when the conditions upon which they are given remain wilfully unperformed; and when they greatly injure creditors.

To these exceptions, some authors(^a) have, I think erroneously, added:—

(a) See Spav. Puff. ii. p. 68, note.

When the donee wickedly attacks the life, reputation, or happiness of the giver.

When the donor has children unexpectedly, if the gift be considerable.

The intention, and the manner of bestowment, constitute the rule of estimating gifts. An effect is necessary to oblige us to gratitude. Gifts should be dispensed with judgment. We should receive well-meant benefits cheerfully.

If a messenger be appointed to notify a gift, by one who afterwards dies, before presentation, the donation is, in natural law, good, when accepted; for the giver's existence is not necessary to the donee's acceptance.

Of sales.

XII. An agreement to sell goods is a promissory contract, and raises only a personal obligation. To complete the bargain, and give to the vendee a right to the goods, a positive transfer is necessary.

It may be shown:—

By transfer in writing.

By delivery of the whole of the goods, or of a part of them.

By receiving the whole of the price, or a part of it.

Without the consummation of the contract, by one of these modes, it is manifestly incomplete. The person who has agreed to sell the goods, will be guilty of a moral wrong, if, without sufficient cause, he decline to deliver them up to the party who has agreed with him for the purchase of them, upon his performing his part of the agreement. But nothing less than an actual

transfer expressed by one of the above forms, will vest the property of the goods in the purchaser.

In the case of a promissory contract, the seller is liable to any loss which the thing afterwards sustains; for he, as the owner, must naturally bear the injury which his property undergoes. On the occasion of a real transfer, the purchaser, being the owner, must bear the loss, for the same reason. If a loss have arisen through the fault of the vendor, he is bound to make reparation to the vendee; but this arises from a principle of justice, and not from the contract.

A second sale is void, where there has been a real transfer to the first purchaser. But an actual transfer must give to a second purchaser a better right to the goods, than he has who has merely agreed to purchase them. The first vendee is, however, entitled to a remedy for breach of the personal obligation.

This is only a general explanation of contracts. The stipulation of other lawful terms, by the parties, is binding upon them.

XIII. In cases in which our property may be used, without being consumed, or perishing, as houses, land, cattle, books, &c. we may permit another to use it, still retaining our right to the goods themselves. This is called a loan^(a), and, unlike to a gift, is a reciprocal contract; for a mutual obligation on the lender and borrower springs from it.

The obligation upon a gratuitous lender is not to take

(a) See *Les Cinq Codes*, Code Civ. liv. iii. tit. 10.—Spav. Puff. ii. p. 90. Turnb. Hein. i. sec. 342 & 343.

any thing for the use of the thing lent. He is not, as it has been contended (a), bound to repay to the lendee whatever necessary expense is laid out for the preservation of the thing lent; for it is but fair that he who has the benefit of a thing, should suffer the loss incidental to its use.

All other obligations, as not to call for the thing lent before a particular time, or to insure it from accidents, are not essential to a loan, but are matters of special contract.

The lendee must return the property, when demanded by the lender; for it was no part of the contract that he should have more than the temporary use. He should also restore it in as good a condition as it was in when he received it; reasonable wear excepted: for the owner did not design, by his contract, that he should have the right to impair it. He is not at liberty to apply it to other uses, or for a longer period than the lender authorises. And if it be injured through his neglect, it is his duty to pay the amount of the damage. But if the loss be accidental, and such as the property would have sustained in the hands of the lender; as if a house or trees be accidentally burnt, or a horse die of natural disease, the borrower is not liable. The contract implied no benefit to the lender by the act of loan.

Loans of consumable things are those in which the use is inseparable from the property. Of such a nature are money, liquor, and corn. In such cases, therefore, the property, not the mere use, is transferred. But the condition is annexed to the grant:

(a) See Spav. Puff. ii. p. 99.

that the thing shall be returned in the shape of an equivalent.

The widely extending question, as to the differences of value in cases of loan, at the times of lending and returning, may be comprehensively answered, by the proposition that a full equivalent must be returned—if the loan were specifically of goods, or metals, or particular coins, they must be returned of the same quality and quantity—if in money, by a sum precisely equal in amount to that borrowed. That which was specifically lent must be specifically restored. It is true, that goods, coins, and money, of the same quality and quantity, are frequently not of exactly the same value when returned as when lent; but this change is unavoidable, and would have taken place as much if the thing lent had continued in the owner's possession, as after it was transferred to the person to whom the property was lent.

XIV. Pledges should be taken due care of by the pawnee, and returned without neglectful damage to the pawnor, so soon as that which they are deposited to secure, is repaid. The person to whom the pledge is given is not liable for damage, if he unavoidably lose it before tender of the sum due. Of pledges.

XV. The lawfulness of taking interest has been objected to upon these grounds:— Of interest.

The alleged command against it in the Mosaic law (a). *Answer*—The Israelites were forbidden only not to take usury of one another, which injunction

(a) See Levit. xxv. 35, &c.—Deut. xxiii. 19, 20.

does not prove the taking interest to be morally vicious. And the equality of effects prescribed by the Mosaic dispensation accounts for the making of the command.

That we cannot consistently take a consideration for what we lend. *Answer*—It is not unlawful for the lendee to give, and therefore it is not unlawful for the other party to take, such a consideration. And the objection would, if valid, apply to the payment of rent, for the use of houses and lands.

That no profit can arise from money without labor, and that the profit must therefore belong to the laborer. *Answer*—Labor alone would not have produced it. The owner of the money, and the laborer, are therefore entitled to the profits.

That the property in money, and the use of it, are inseparable, and that the person lending can therefore justly demand no more than the return of what he has lent. *Answer*—The gain which money produces, causes the lender to part with a valuable consideration, besides his money. It is therefore not inconsistent with justice, that a borrower should bargain to pay interest, or that a lender should insist on that bargain being performed.

The fair way of calculating the rate of interest, is: not to consider it such sum as the highest gain of it would have been, for the amount of gain is uncertain; nor the lowest, for the same reason: but, to deduct from the average gain, a reasonable allowance for the uncertainty of profit, and the value of the labor expended by the user. If the lender run a palpable hazard, a higher rate of interest, proportioned to the extent of his risk, may be justly expected.

Compound interest is not contrary to natural justice; but it is highly impolitic, as regards the debtor, from its burdensome character. It must be therefore discouraged in all cases in which it is not clearly contracted to be paid.

So soon as money remains unpaid after a fixed time of settlement, the money being, in justice, the lender's, he may claim compensation, by way of interest, for such damage as he sustains by not having his property returned to him, although there be no agreement to pay interest. But in such a case, the calculation of interest on the loan, is the equitable compensating rule; for endless intricacies, and continued litigations, would attend the right to recover consequential damages for non-payment, and men should scarcely be made to suffer for unforeseen contingencies.

The principal should be returned in such specie, that the borrower may have the same amount, as if he had kept the money in his chest.

XVI Letting, is granting the use of tangible property, for money or goods. The principles applying to loans will generally also apply to this description of grant. Of letting.

The proprietor of the thing, the person letting, is liable to all real losses which happen to the thing itself, without the tenant's neglect, if used by him for the purposes obviously intended by the parties; as, with respect to houses, from fire and tempest, occupation by a foreign enemy, &c.

The tenant, or owner of the use, is liable to all accidental losses, which neither naturally impair the thing itself, nor hinder him in the actual use of it; as

loss from a situation becoming less public, and therefore less profitable, &c.

Of servants,
and engage-
ments of la-
bor.

XVII. An engagement to labor or serve, is where an individual or servant contracts to do particular or daily work for another, in consideration of reward in money, goods, or instruction.

The master is liable to pay the wages agreed for, if the labor stipulated were for a certain time; for then the quantum of labor agreed for, was 'for better, for worse.' He is liable only to pay the value of so much labor as is expended for his use, if the servant be disabled, or refuse to finish task-work. He is liable for the acts of his servants, whilst in his actual employ^(a), unless the party injured know that they are absolutely contrary to the master's command.

Servants are bound to obey their masters' commands, and to do for them all the work for which they contract, in the best manner they can. Good servants will respect their masters, and do to them as much good, and as little harm, as possible; for this is an obviously rational duty. They may labor for others besides the first hirer, if, by so doing, their labor be not rendered the less valuable to him. They are not bound to obey any unlawful commands, or such as the nature of their contract, or custom, does not render them liable to. Servants, whose wages are instruction, are entitled to their masters' best information.

Servants have an imperfect right to the enjoyment

(a) See Bl. Com. i. c. 14.—Chitty's Notes on ditto.—4 Inst. 109.—Noy's Max. c. 43, 44.—Doct. and Stud. D. ii. c. 42.—Bac. Abr. tit. *Mast and Serv.*—3 Esp. Rep. 235.—2 Bl. Rep. 845.—3 Willes, 341.—1 Just. Inst. 4. 5. 1.—Ll. xii. Tab. Rom.

of any harmless pleasures, not interfering with their employers' business and comforts.

Mutual kindness should be the rule of the government of masters, and of the obedience of servants.

XVIII. Sureties and bails (*a*) for the debts or agreements of others, are bound to perform their engagements, according to their rational construction. The obligation of each of them is equal. The creditor should look to each for payment. They should pay, when their principals cannot be made to do so. Of sureties.

They are entitled to have the performance first demanded of the principal, if he can be found; and to the benefit of proportionable division and indemnification. If the security given be of a simply-joint character, they are only co-liaible. If one be compelled to pay the whole demand, he may claim of the other the repayment of his proportionate share.

XIX. Insurance (*b*) is the act whereby a man contracts to protect another against loss, with regard to property, in consideration of money or goods, or the use of either of them, for contracting such risk. Of insurance.

These are the rules of justice affecting it:—

The goods must not have perished, to the knowledge of the insuree, before the contract is made; for that is more than was designed by the other party in contracting.

For the same reason, they must not be out of all danger or risk, to the knowledge of the insurer.

(*a*) See Spav. Puff. ii. p. 123.—Senec. de Benef. 3. 15.—Turnb. Hein. i. sec. 374 to 378.

(*b*) See Park's Insur.—Emerigon. Traité des Assur.

There must be an equality of knowledge, and equivalency of value, on each part, so far as the nature of things will admit; otherwise the contract will be, for inequality, void. If the account given by the insuree, and which forms the real basis of the contract, be grossly erroneous, or wilfully deceitful, the contract is void. But the person indemnified is, if compensation for loss be refused upon this ground, entitled to a return of the consideration given, for it was not intended as a gratuitous gift.

Of partnership.

XX. Partnership is when two or more persons, for mutual benefit, join money, goods, or labor, or any of them, in common, reserving to each other a certain divisible share in the profits arising from them. The share of profit or of loss which each partner is to have, in the absence of positive agreement, is in proportion to the value of money and labor contributed to the common stock. A partner contributing money should receive such benefit out of the profits as the risk of his capital fairly entitles him to; and the same rule may be applied to the contribution of labor. Partners cannot separately claim the return of their contributions, until a dissolution of the partnership. For it was agreed that the stock should, until such dissolution, be common in business, and the partners desiring to withdraw, must stand to their original obligation, unless the others agree to release them. Each partner is an agent for the rest, and all the firm is bound by the acts of one member of it.

Each member is bound to use all diligence and faithfulness in the common affairs.

Contracts, whereby loans of money are advanced to

form part of a business-capital, on condition that the lender shall incur all the loss, and have none of the gain, are not of partnership, but are consistent with justice, being of the nature of conditional gifts.

Partnerships may be dissolved:—

By the mutual consent which produced them—

On the complete accomplishment of the partnership business; for then the wills and obligations of all the partners are satisfied; or at the time mutually limited, for the same reason—

On failure, by either party, of the express condition of rendering an equivalent to the common stock, if the partnership were not to go on but upon such condition being performed. For this is fairly to be taken as a non-complying determination of the partnership—

By death of one of the partners, if labor, which is a personal obligation, and does not descend to the next of kin, formed a part of the deceased's duty.

On the dissolution, each partner is to draw out, according to the value of what he has contributed.

XXI. Contracts of chance are known by the name of wagers, and games.

Of contracts
of chance, &
games.

Wagers are where two or more either part with stakes, or are trustees for stakes, forming a joint or common stock until the wager is decided, when the distribution takes place according to the decision. They have, for this reason, been called partnerships. Each party must have an equality of knowledge, unless the personal acquaintance with the fact be stated and waived; or be obvious to the ignorant party at the making of the contract. The deposit of each person is

the purchase-money for his equal interest in the whole stock. Each party should deposit as much as his chance is worth. The parties must therefore have an equal chance of winning the whole stock, subject of course to the exception of waiver above mentioned.

In games, the stake of my antagonist should, in strictness, so far exceed mine, as his skill exceeds mine. Our interests will then be equal. But as this exact equality seldom exists, and is still more seldom ascertainable, games are fair, when one party takes no advantage, which the other does not intend to give.

CHAPTER X.



OF TRUTH AND OATHS.

§ I. IT is our duty to treat every thing as of its real nature, and not to deceive others. All infractions of fidelity are breaches of the right which we confer upon those whom we contract with, or promise to. If we do not express what we think to those with whom we contract to do so, we do not comply with what we have vested in them a right to demand of us. By professing to give information to a man, I tacitly consent to tell him the truth. There is then an obligation on me to do so, and there is a resulting right in him to demand the truth of me. If, by wilfully deceiving him, whether by speech or action, I infringe upon his right to know the truth, I then do to him an unlawful injury (*a*). The falsehood may be of little damage to him; but of that I am not the fit person to judge. The pretence raised by me, of the unimportance of the injury

Our duty to observe the truth explained.

(*a*) See Godw. Pol. Just. i. p. 238.—Herodot. lib. i. sec. 138.—Cic. Off. lib. iii. c. 29.—Tyr. L. of Nature, c. 4, sec. 14.—Grove's Mor. Phil. ii. c. 11.—Tillots. Serm. on Sincerity.—Countess Aranda's Ideas of the Noblesse, part iii. 11th ch.—Turnb. Hein. lib. i. sec. 202.—Paley, i. book 3, part i. c. 15.

will not justify its infliction. The faculty of speech was given to us for the purpose of frankly expressing our ideas to others, and not for the object of deception. The truth is to be expected from him who seriously speaks to another, unless there be an obviously-virtuous reason for its concealment. Society cannot exist happily, without an exercise of judgment.—Judgment cannot be formed by men, without a dependence upon the assurances of others. The performance of such assurances, therefore, is essential to the welfare of society, and is the necessary duty of man.

Breaches of truth are by speech, by action, or by omission.

A lie is a corrupt and inexcusable falsehood. A man does not utter a lie, unless there be a criminal intention to deceive.

Lawful concealment of the truth.

II. The following concealments of the truth are lawful:—

By silence, unless the party would be immediately injured by it; for we give to him no right. But if injury would ensue, the concealment is unlawful, as doing him causeless harm—

By custom well established and generally known, as in the complimentary subscription to a letter, or in the precatory declaration at the foot of a petition. It is upon this ground, that the denial of a master, by his servant, is justifiable (a). But it is the master's duty to explain to the domestic, that such denial is not a corrupt breach of truth; but is, according to the fash-

(a) See *contra*:—Godwin. Pol. Just. i. pp. 26, 246, & 266.

ion of the times, another mode of saying that he is engaged, or does not desire to see the visitant—

Where we have given authority to an individual over us, for a particular lawful purpose, and that purpose cannot be gained without deception. Thus a master is not always bound to tell the truth to his servants, nor a surgeon to his patient, nor an officer to his soldiers. Nature also allows us, in some cases, to withhold the truth from madmen, idiots, and infants; who do not, in such instances, acquire rights by promises. But we are not therefore justified in telling to them falsehoods which may injure them—

Where there is no promise implied: as in the statements of fictitious compositions; which profess only to amuse and instruct, and do not undertake to state facts. But this will not apply to historians. An intruder listening to the conversation of two persons, may lawfully be deceived. In this rule are included doubtful signs, as in the instance of shutting the outer doors of the rooms of a student at a college; which, at first sight, in the day-time, raises the presumption that the resident is not at home; but he may be engaged with select company, or in study, or desire not to be interrupted. It has been much doubted how far this principle may be extended—as far, I apprehend, as common custom, and the known forms of the world will justify it. The forms and circumstances of society should often be considered in judging of moral acts; and particularly in cases of disputed veracity. The title of “Friend!” addressed to Judas, by the founder of our divine faith, is a striking illustration of this principle—

In war: for an adversary can never be presumed to contract to give information injurious to himself.

But in terminating war, deceptions are unjustifiable. Nor are we obliged to tell the truth to persons who use fraud, force, or fear, to extort confessions from us; for then there is no free and binding consent.

For clearly-virtuous objects, in those cases in which the end will justify the means (*a*).

It will be seen, therefore, that the obligation to tell the truth, exists only where there is a right, in the person told, to know it.

Definition,
object, na-
ture, and ob-
ligation of
oaths.

III. An oath (*b*) is a solemn appeal to God to witness the truth of an assertion, and whereby we generally profess to renounce his mercy if we depose falsely.

Oaths are made to satisfy others of our truth. They are said to be all of a promissory character (*c*); but they may, for the sake of classification, be properly divided into:—

Assertory, which declare the existence of what is past, and Promissory, which declare what our future conduct shall be.

Oaths being intended to confirm our statements, necessarily involve a promise of strict veracity. It is sophistry to argue that an invocation to the Deity, on the occasion of an assertion, is not a tacit renouncement of his favor, if we swear falsely. Such an argu-

(*a*) See My Thought Book, p. 18.

(*b*) See Maimonides de Jurejurando.—Jac. Lydius de Juramento.—Grot. book ii. c. 13.—My Thought Book, p. 237.—Godw. Pol. Just. ii. p. 631.—Cic. Off. lib. iii. c. 10.—Spav. Puff. i. p. 169.—Herport on Oaths.—Herodot. lib. vi. sec. 74, and lib. vii. sec. 122.

(*c*) See Ruth. Inst. vol. i.—Turnb. Hein. i. sec. 206.—Spav. Puff. ii. p. 19.

ment can be grounded only upon a supposition, that we are not aware that by calling upon God to witness the truth of a fact, which we know to be false, we voluntarily expose ourselves to his just displeasure and punishment.

IV. Forms of solemnity are expedient in the administration of oaths, in order to impress the juror with serious notions of the act of swearing. But no particular external form is necessary. It is sufficient that the person swearing invokes the Divinity of his belief, either immediately by name, or figuratively, by a type of his creation. With Christians, the kissing the received writings, appears to be the most impressive and respectful ceremony. It is indispensable that we firmly believe in the Deity whom we appeal to, and in his power and will to punish falsehood (*a*). But it is not essential to the validity of the oath, that such God of our adoration should be the one true Spirit whom Christians worship. The form also of the oath should be conformable to the juror's persuasion of obligation.

Of the forms
of oaths.

V. The obligation to observe an oath is not distinct from the promise which it is intended to confirm by the danger of punishment. It only strengthens externally the original pact, and renders its infraction subject to a higher penalty. It does not add to the obligation. The duty which we are under not to profane the majesty of God, by appealing to him as a sacred witness

Of the obligation to observe them.

(*a*) See Turnb. Hein. i. sec. 207.—Spav. Puff. ii. p. 11.—Hobbes. Harl. MSS. 1325, p. 132.

of the pretended truth of that which is really false, is obvious to all who know his power and perfections.

Of the interpretation of oaths.

VI. Oaths are binding where there are outward signs of an intention to swear, notwithstanding mental reservations. The palpable meaning of the person imposing the oath, is the test of its construction.

Established marks of expression represent the intentions of the individual. To pretend not to do that which, to all human appearance and understanding, we actually do, is absurd. The excuse that God knows our hearts, and cannot be deceived, does not release us from the penalties to which we freely expose ourselves, by solemnly confirming an obligation which we owe to a human being. The effect of obligations depends upon the outward expression of our intentions: not upon our inward feelings or scruples, which are unknown to others.

Of the security which they give.

VII. The security which oaths give consists in the voluntary subjection of the juror to punishment, if he swear falsely. The fear of incurring God's displeasure, by false swearing, conveys to the juree a stronger assurance of the juror's veracity. Falsehood is a crime. Perjury is falsehood and profanity combined; and is therefore a deeper offence. Falsehood must anticipate punishment, but may expect forgiveness much sooner than profane swearing.

Of the solemn declarations of non-jurists.

VIII. Solemn affirmations, such as those resorted to by the people called 'Quakers,' do not convey so high

(a) See Hobbes. Harl. MSS. 1325, p. 132.

a pledge of truth as oaths. But they are not properly considered as merely light or unstrengthened assertions.

IX. It is not expedient that oaths, which require corporeal solemnities, should be taken by proxy, especially as it may be difficult sometimes to ascertain how far the agent is authorised to swear. But a man may naturally empower another to go through certain forms of an oath for him, and he is bound by it so far as the agent follows the authority of his principal, but not further.

Of oaths by proxy.

X. A binding vow (*a*) is a promise whereby we oblige ourselves to God to act in a particular lawful manner. Vows which we have reason to believe that God will not accept, are not binding. Others are so. God cannot expect us to perform vows promising the doing of acts displeasing to him. But we are under an obligation to perform such promises to him as are consistent with his will. And it is highly irreverent conduct towards him, either to vow to do an unlawful act, or not to perform a lawful vow.

Of solemn vows.

XI. All oaths confirmatory of void promises are invalid. The before-stated principles, therefore, which govern the validity of promises (*b*), regulate that of oaths also.

Of void oaths.

Oaths made to robbers and criminals are not essen-

(*a*) See Herodot. lib. i. sec. 74, and lib. iv. sec. 70.—Civil and Natural Hist. of Siam.—Larcher.—Le Pere Daniel, Hist. de France, tom. x. p. 532, 4to.

(*b*) See Ch. 8, sec. 3.

tially void on account of the character of the persons to whom they are made; for those to whom we give claims may justly demand them of us; but their validity may be ascertained by trying them by the tests of binding promises.

Of jurors' heirs.

XII. Oaths, being personal acts, are binding only upon the person swearing. A man cannot renounce the favor of God towards others. At the most he can effectually call for the Deity's displeasure upon himself only. The penalty, therefore, of a false oath can attach but to him. And neither his heirs nor any other persons on earth are bound by his solemn protestations or imprecations.

Of unnecessary oaths.

XIII. The reverence which we are bound to entertain for God, should induce us not to call for asseverations in his most holy name, oftener than necessity imperatively requires.

CHAPTER XI.

OF THE RIGHT OF PERSONAL DEFENCE.

§ I. THE right of personal defence (a) is the right Definition and nature of it. which we have to protect ourselves, by all necessary means, against unjust injuries to our persons or property. The law of nature allows us to defend ourselves in the exercise of all the rights which we possess consistently with that law. For to have an individual proprietorship in a thing which any one else may, at pleasure, take from us, or molest us in the possession of, without our having a right of resistance, is a contradictory absurdity.

II. Natural law, which is ever consistent, allows us its extent. to use all the necessary means of self-protection. He, therefore, who attempts to injure us, by breaking in upon our rights, subjects himself to our indefinite exercise of such remedies as his aggression and our natural enjoyment render necessary to avoid the impending harm. We are not obliged to submit to any causeless injury, whether it proceed from an innocent, or from a malicious design.

(a) See Ruth. Inst. i. p. 372.

The law of nature does not prescribe any particular means of defence, for if it did, those means only could be resorted to; and it would be open to the violators of rights, to take any measures for the rendering such prescribed modes abortive: and we should have no right of self-defence when they failed in effect.

These two fundamental principles should guide all our enquiries upon this subject.

Defence or non-defence is optional with the party attacked. The former is taught by prudence. The law of nature, although it permits, does not expressly command, us to defend ourselves against every injury. It is consistent with the law, because it is not forbidden by it; but it is not one of its obligatory precepts. But benevolence is enjoined towards all mankind. We are, therefore, bound to exercise our right of self-defence with mercy. To avail ourselves of every trifling opportunity of affront or attack, with unrelenting severity, cannot be agreeable to our duty of benevolence. The world would not enjoy the slightest comfort or repose, if the least deprivations of our strict rights were always to be met with violence or expiation. We should vindicate our own claims, with reference to the enjoyments of others. We should consider the happiness of another to be as important in the general scale of existence as our own. But we are not required to regard it as of superior importance. If a man, knowing that I possess certain rights, wilfully attempt, by force, to deprive me of them, the protection of myself against his causeless and therefore unjustifiable harm, is not unjust; nor is it inconsistent with benevolence, which does not require me to be more tender of an aggressor's safety than of my comfort.

III. If a man's life be attacked in any way, he is at liberty to do whatever is, in his judgment, actually necessary for self-preservation. The end is justifiable, and the means necessary for its accomplishment are so too. Benevolence recommends us to be as mild as we can in our inflictions, but a man whose life is in danger has seldom the coolness of judgment necessary for calculating deliberation.

Defence of
life.

If, again, his life be but seriously threatened, he may, in a state of nature, forcibly insist upon security for his protection. For he is not bound to wait in constant terror of his life, until it is actually attacked, and at the time of which attack, the varying circumstances of life may place him in an almost defenceless situation. In proportion to the moral certainty of the person threatened, that his life is in danger, he has a right to demand pledges for his future safety, and to enforce that demand, if necessary. The party threatened may apply armed, to his threatener, and demand security; and if it be refused, he may so wound his enemy as to disable him from self-defence, and may then imprison him until the demand is complied with. If imprisonment be, from circumstances, in the judgment of the injured party, impossible or unaccomplishable, then life may be attacked. The law of nature highly respects the lives of all men: their loss is irreparable. Without an endeavour to imprison, life may not be so taken away. At the same time, I am inclined to think, that in the eye of God, the deprivation of life, under such circumstances, would not be a great crime; for he will allow much for that ardent love of life which he has implanted in us.

We may forcibly resist, even to the taking away of

life, if necessary, the attacks or impediments of the innocent, made under the influence of error or ignorance, as well as of the guilty, made with design; when we are in immediate danger of causeless harm to our persons (*a*). But if two persons be in danger, and something belonging to one may be the means of safety, the owner is entitled to the preference. And the life of a person, manifestly of more general importance to mankind, should be preferred. Any one may be prevented from placing our lives in imminent danger (*b*). There must, in these cases, be a moral certainty of intention. If the life of an innocent person be taken away in self-defence, it is but just to provide, as well as we can, for the loss of his dependants.

Defence of
limbs.

IV. If a man's limbs be in danger, he may use such means as are necessary for their protection, even to the extinction of life. For the attacking party gives him a general right to attain the self-preserving end in view. Our liberty to use our limbs would be of little service, if we were under an obligation to submit to any injuries attempted to be done to them.

Resistance to slight personal attacks is lawful; and such means may be adopted for the purpose as the avoidance of further injury renders necessary; but if we were to kill another on so slight a ground as a trifling pinch, or a gentle blow, we should not obey the law of nature (*c*), which requires us to love another as ourselves. If we place more regard upon our suf-

(*a*) See Spav. Puff. i. p. 204 and 223.—Grot. book xi. c. 1, sec. 9.

(*b*) See ditto, i. p. 224.

(*c*) See contra:—Spav. Puff.

fering a very little pain, than upon the life itself of another, we evidently disobey that law.

V. The principles lastly stated govern also the defence of personal liberty.

Defence of personal liberty.

VI. If a forcible attempt be made by a member of either sex, upon the chastity of one of the other, the same principle before stated, of using all necessary means of resistance, will apply to the case, and the life of the ravisher may be taken away (*a*), if, in the judgment of the person attacked, that infliction be necessary for protection's sake. For another has no more right to the disposal or use of a person's body, than he has to maim or kill that body.

Defence of chastity.

VII. The same reason—that of the natural law not requiring us to part with our rights, before applied, will solve the question—to what extent we may exercise the right of protecting our goods. We may use all such modes of resistance against the attempts of robbers, as their violence renders necessary for the protection of our property, even to the deprivation of life (*b*).

Defence of goods.

It has been supposed to be inconsistent with benevolence, to deprive a robber of life; but if we have natural liberty to defend our goods, and we take no means of protecting them but what his attack renders necessary, we cannot infringe upon what benevolence

(*a*) See Just. Inst. 4. 3. 2.—Civ. L. Digest, 48. 8. 1. 4.—Grove's Mor. Phil. ii. p. 358.—Paley, ii. c. 1.

(*b*) See Laws of Moses and Solon.—Spav. Puff. i. p. 215.—Buddæus. Elem. Phil. 11. par. c. 4. sec. 3. 14.—Ruth. Inst. i. p. 389.

requires of us. For benevolence is a law of nature, and there is no branch of natural law inconsistent with another branch of it. Benevolence, on this subject, requires no more than that we should exercise our own rights, with as little injury to others as possible. A benevolent man will never set up trifling advantages in opposition to life—the most precious of all things. But charity towards others does not injoin us to surrender that which is valuable to us, or which is necessary to the happiness of our immediate connexions, out of a fearfulness of being the innocent instruments of the plunderer's loss. A notice, however, to a robber, that we shall strictly exercise our natural right to its full extent, is a merciful and courageous precaution. But even this cannot be positively required, as it may, by placing the assailant on his guard, avert the effectuality of defence.

It is inconsistent with the law of nature to be concerned in frivolous contentions, about things of no real importance. But we are not obliged to suffer unjust inflictions unresistingly, merely because the injury is not of much moment. If we submit to trifling oppressions, we must expect great ones to succeed (a). Oppressors calculate upon advancing their pretensions by imperceptible degrees. We therefore resist apparently trifling injuries, in order that we may not ultimately suffer great evils.

*Of defence of
honor; and
of duelling.*

VIII. In stating the law relative to the defence of personal honor, it is important first to consider what that honor really is. For the vain and selfish notions

(a) See Thomas's Argument for Publicity of Courts of Justice.

of some are, properly speaking, of a grossly dishonorable character, although they arrogate to themselves the feeling of being acutely sensible of every imputation. The tenacity of such men is often the cloak for knavery and unworthy feeling.

We cannot expect to live in such a world as this without receiving occasional affronts, and we should bear many of them patiently; and all of them with true dignity.

To be a man of honor, is to obey the code of nature, and to deserve the admiration of mankind in general. Actions, to judge of their honorable or dishonorable nature, should be viewed in all their parts. Duelling is, to a certain extent, beneficial, but it is in a greater degree injurious. It is, properly speaking, neither a remedy nor a punishment for supposed wrong, but it rather tends to increase the evil. It is glorious to bear an evil with greatness of soul. It is base pettily to resent it. And duelling appears to be contrary to the law of nature. For if we may not lawfully kill ourselves, how can we voluntarily subject our lives to premeditated and easily-avoidable danger, without breaking the law? Mere imputations on our character, do not, in ordinary cases, subject us to irreparable injury. We should have ourselves held in higher estimation by the world, than to be injured by every passing breath of report. And the law of nature does not justify us, either in placing our life in immediate and needless danger, or in killing another, because of his having told a lie injurious to our reputation (*a*). At the same time, it

(*a*) See Cic. Off. lib. i. c. 11 and 25.—Paley, i. book i. c. 2, and book iii. part 2, c. 9.—Rushworth Abridged, vol. ii. p. 58.—Aristot. ad Nic. lib.

permits us to require of him, either a compensation for his doing us causeless harm, or, if he be unable to make that compensation, then a pledge, that our character, which is of so much importance to us, shall not be wantonly and unjustly attacked again by him; or, in default of these, we may inflict a slight punishment. Otherwise we should be without a remedy for a notorious wrong. How this pledge may be demanded, has appeared in the third section. Some have contended that we may punish the libeller at discretion, even so far as to inflict the loss of life; but this is vague reasoning, and the reader will perceive how inconsistent it is with benevolence.

iv. c. 5.—Spav. Puff. ii. p. 320 and 326.—Hob. Lev. c. 10.—Godw. Pol. Just. i. p. 94.—Montesq. Esp. d. L. liv. xxviii. c. 20.—Vatt. book i. c. 13.—Ruth. Inst. ii. p. 183.

CHAPTER XII.

OF REPARATION FOR INJURIES.

§ I. REPARATION (*a*) is a compensation made for Definition of it.
causeless or unjust injury inflicted by one man upon
another, occasioning him a loss, which the injured party
has a right to demand, and insist upon.

II. The restraint which the law of nature imposes Origin of it.
upon men not to hurt one another, would be ineffectual,
if it did not oblige the injurer to render reparation.
For if that law, when a wrong was done, permitted it
to remain unrepaired, it would, in effect, encourage
the commission of injuries. The law, therefore, which
gives the right, confers not only a power to secure it,
but also a remedy for its deprivation; and that remedy
may of course be attained by reprisals and force, if
necessary.

III. But to entitle the injured party to reparation, Of the right to reparation.
the right, which is the subject of the wrong, must be

(*a*) See c. 15.—Grot. book ii. c. 17.—Ruth. Inst. i. p. 399.

precise, definite, and perfect; otherwise it cannot be legally ascertained what he has lost.

The breach of an imperfect right can give no claim to reparation, which is due only when something strictly, definitely, and properly, an individual's, is taken away from him. Thus an infraction of the duty of benevolence gives no remedy to the neglected supplicant.

But the prevention of another, by wilful deceit or force, from enjoying such advantages as might have arisen from suing for or exercising an imperfect right, is a breach of a perfect right, and entitles the party incapacitated to such damages as his chance of success was reasonably worth.

Of accessories. IV. Accessories (*a*) to an act of wrong are liable to make reparation in proportion to the assistance which they give; for the damage is in part to be attributed to them. Accessories in the higher degree are:—

By acts:—

By personal assistance.

By hiring.

By command, having authority.

By consent, it being necessary.

By open protection of principal afterwards.

By privately harboring him.

By omissions:—

By non-constraint, having authority to constrain (*b*).

By not forbidding, having authority.

(*a*) See c. 13. sec. 16.—Bl. Com. iv. c. 3.—1 Hale, P. C. 615.—Fost. 350.—8 Inst. 138.—2 Hawk. P. C. 315.—Stiernhook de Jure Goth. lib. iii. c. 5.—Spav. Puff. i. p. 67 and 237.

(*b*) See Senec. Troad. L. 289.—Curcellæi Compend. Eth.—Civ. L. Dig. lib. ix. tit. 2.

By non-assistance of the injured person, being under an obligation to assist him.

By non-prevention, having the moral power.

Accessories in the lower degree are :—

By action—*i. e.* by incitement or persuasion.

By omission :—

By non-dissuasion, if they ought to dissuade.

By non-discovery, when they are bound to discover.

By unreasonable want of caution.

V. The injured party is entitled to such damages as will, as nearly as possible, indemnify him against the loss sustained (*a*). For this purpose, the following are the general rules to be observed in the estimation of damages: The value of the thing, and of its profits, is to be considered. The labor and expense which the owner would have been put to, in realising the profits, are to be deducted from the gross value of them. The rightful owner is not bound to allow for improvement in a thing restored to him; as such improvement is a wrongful act of alteration, effected without his consent (*b*). The injured party is entitled to something more than the mere damage; as the cutting off of hope from the mind, is an evil for which he may justly claim remuneration. All contingencies, to which the enjoyment of the thing was subject, and which lessen its real value, are to be taken into consideration. Where several are jointly concerned in a wrong act, and the act of each of them alone would have produced

Modes of estimating reparation.

(*a*) See Turnb. Hein. i. sec. 212.—Spav. Puff. i. p. 236.

(*b*) See contra :—Grotius.

the same quantum of injury, all are separately liable to make good the whole damage. Where several persons are jointly concerned in a wrong act, but the damage done by each of them is divisible and distinguishable, each of them is bound to make good only so much of the whole damage as he occasioned. Damages for consequential, as well as for immediate losses, are recoverable; and the professed intention of the aggressor is no reason to lessen the amount. A joint wrongdoer who is compelled to pay the damage occasioned by his injury, has no claim upon the other for contribution, as a joint-surety has, in a case of contract.

Losses for
which repara-
tion is de-
mandable.

VI. The following are the causeless losses, for which reparation is demandable:—

Loss of life. The wilful depriver is bound to pay for the medical attendance upon the deceased, and to render such reparation to those who had a right to be maintained or served by the deceased, as is fairly equivalent to their loss; his fortune, age, and circumstances being considered. The worth of their expectation, *i. e.* the value of their interest in his life, is the reparation to be made.

Maiming and striking. The injured has a right to the medical charges which he incurs, and to compensation for the pain which he has suffered, for the loss of time which he has sustained, and will sustain in consequence; and for any consequential deformities or scars. This right commences in the womb (*a*).

Unjust imprisonment. The person imprisoned has a right to damage, for his loss of time, his anxiety, and any other losses arising from the wrong.

(a) See Spav. Puff. i. p. 5.—Exod. xxi. 22.

For debauching a wife (*a*). The husband is entitled to compensation for the loss of his wife's affections, and of his connubial enjoyment, the disturbance of the peace and happiness of the family, of which he is the representing head, and the obloquy which that family sustains in consequence. He may also demand protection from maintaining any spurious issue, the result of the impure connexion.

For debauching a woman by force (*b*). In this case the ravisher is at the least bound to make such reparation as will bear the ravished harmless against her loss of marriage. And a fine feeling of justice dictates marriage with her (*c*), if she be willing; for that seems the best reparation in the power of the aggressor, and puts her into a situation to enjoy those connubial rites, from the enjoyment of which the injurer had before incapacitated her. But I do not agree with some writers, in supposing that if a female lose sight of her natural modesty, and voluntarily surrender her person to a man, without marriage, she is therefore, for her own wrong act, entitled to recover damages from him (*d*).

Theft. The thief is obliged to return the fair value of the thing, and of its fruits, and of all loss sustained through the robbery.

Slander. The wilful slanderer is under an obligation to acknowledge the falsehood of his calumny,

(*a*) See Civ. L. Dig. 48. 5.—Bl. Com. iii. p. 139.—Ruth. Inst.

(*b*) See Deuteron. xxii. 25.—Civ. L. Cod. 9, tit. 13, and 9. 9. 22.—FF. 47. 2. 29.—Bract. lib. iii. c. 28.—Stiernhook de Jure Sueon. lib. iii. c. 2.—LL. Gul. I. c. 19.—Glanv. lib. xiv. c. 6.—1 Hale, P. C. 631.

(*c*) See Deut. xxii. 25.

(*d*) See Ruth. Inst. contra.

and to pay such damage as the slandered sustains from it (a). The amount of reparation claimable is according to the greatness of the accusation, the foundation for the charge, and the manner, time, and motive of publication.

All acts of spoliation, unjust force, indiscretion, or negligence, whereby harm is inflicted (b). In them are included the acts of one's slaves, servants, or beasts (c), if arising from the carelessness of the owner. It is our duty so to conduct ourselves, as not to injure any. If we do, we must remedy the evil caused, so far as we can, by paying the damage sustained from our injury, so nearly as it can be ascertained. And as it is as much a man's duty to prevent infliction of harm by his servants and cattle, as it is not to do evil himself, he is equally liable for their transgressions upon the rights and property of others. But the person hurt has no right to reparation, if the harm done would not have been inflicted, but for his immediate fault; as no man can take advantage of his own wrong.

(a) See Grove's *Mor. Phil.* ii. p. 366.—*Civ. L. Dig.* 47. 10. 27.—*Ruth. Inst.*—*Bl. Com.* iii. p. 123, and Chitty's notes on ditto.—*Finch. L.* 185.—*Godw. Pol. Just.* ii. p. 641.

(b) See *Spav. Puff.* i. p. 56.

(c) See *Plut. Solon.*

CHAPTER XIII.

OF PUNISHMENT.

§ I. PUNISHMENT is the suffering justly and necessarily inflicted, against the will of the party (*a*), for a voluntarily-evil act. Definition and nature of it.

Evils arising from the order and imperfections of human nature are often improperly termed punishments. Punishment is distinct from reparation (*b*).

II. Guilt is an inclination to commit harm, expressed by harm actually done. He who has committed a crime has shown his neglect of reason, and of the natural ties, and is under an obligation to submit to such punishment (*c*) as the offence calls for; in order that mankind may have a security against a repetition of the evil. If men have a right to punish, Of guilt, and obligations incidental to it.

(*a*) See Spav. Puff. ii. p. 306.—Grot. book ii. c. 20.—Bernard Norwel de la Rep. des Lett. Juin. 1706, p. 648.—Senec. Mor.—Godw. Pol. Just. ii. p. 687.—Marquis Beccaria.—Volt. Comment. on Becc.—Dawes on Crimes.—Ruth. Inst. i. p. 419.

(*b*) See Burlamaq. ii. p. 186.

(*c*) See Les Cinq Codes. Code Penal, liv. 3. tit. 1 and 2.—Turnb. Hein. ii. sec. 149.—Quintil. Declam. 11.

the punished must be under a correlative obligation to suffer. But no man is obliged either to accuse, or to inflict sufferings upon himself (*a*).

Actions only, and not thoughts, are deserving of punishment.

The justice
and ends of
punishment.

III. No man should be punished unless it clearly appear that he is guilty. The judging of the apparent proofs must be guided by the exercise of reason. The degree of proofs should be, in some measure, regulated by the extent of the accusation (*b*).

The justice of punishment depends upon the ends which it has in view. Men, in a state of nature, can punish only for such offences as encroach upon their perfect rights, and injure others besides the offenders. It is consistent with the law of nature, to take such steps with him who has broken that law, as are necessary to secure men from again sustaining injuries from the aggressor, who has manifested a disposition to commit wrong, unless prevented. Every one being entitled to take care of his own and the general advantage, the infliction of such punishment as is essential to the object, is justifiable (*c*). But no punishment which has not the end of future prevention in view, is just; for it is causeless harm. Revenge cannot be identified with retributive justice; nor the latter with cruelty.

The first end of punishment is to prevent future offences; in other words, to deter offenders from

(*a*) See Becc. on Cr. c. 18.—

(*b*) See Montesq. Def. de L'Esp. des Loix.

(*c*) See Burlamaq. ii. p. 184. Thomasius. Jurisp. Divin. 3. 7—31; contra: Turnb. Hein. ii. sec. 157 and 193.

vice (a). Its two secondary ends, or rather its accidental effects, are the personal amendment of the offender, and the determent of others from committing the same crime.

There are four modes by which the prevention of future harm is effected :—

By rewarding its non-commission—

By influencing the will, through the infliction of corporeal punishment—

By removing the opportunity of offending, through imprisonment or banishment—

By taking away the power of committing sin, through capital punishment.

Punishment, for the sake of beneficial example, and in order that its infliction may be known, should be as public as possible.

IV. Punishment should produce an overbalance of good. The other just requisites of punishment are, that it should be as much as possible—

Requisites
of it.

Necessary, so that without the means the end cannot be obtained.

Unresentful, for otherwise it is barbarous.

Equally applicatory to all persons, and therefore susceptible of degrees, according to circumstances rationally considered (b).

(a) See Chitty's *Crim. Law*, and Starkie's ditto.—Hawkins' and Staunford's *P. C.*—Becc.—Dawes on *Crimes*.—Russell on ditto.—Bl. *Com.* iv. c. 1.—Virg. *Æneid*, book vi. 620, and note thereon.—Cic. *pro Cluentio*, 46.—Turnb. *Hein.* ii. sec. 148.—Spav. *Puff.* ii. sec. 310.—My *Thought Book*, p. 351.—Horace, book. iii. ode 24.

(b) See Bentham's *Panopticon Penitentiary*.

Palpable, so that the thoughts of the crime, and of the infliction, may accompany each other; open and solemn, that all others may observe and be impressed with it; and inflicted without delay, that forgiveness may not be presumed.

Beneficial to the injurer, the individual injured, and the public.

Revocative, if found to be unmerited.

Measures
of it.

V. The kind of punishment depends upon the nature of the evil act committed. Such degrees of punishment are justifiable, as have the effect of simply obtaining that security against a repetition of crime, which the natural law permits us to demand, by attaching such a motive of fear, as more than counterbalances the hope of self-gratification. Punishment should always be directed to the prevention of a greater evil than that of the infraction. The law of nature does not command just punishment; it only tolerates it. We may require a less quantity of punishment than is necessary for our security, but not a greater. The degree of guilt in an offender is shown:—

By the magnitude of the injury, in proportion to which the evil disposition of the criminal may be fairly estimated.

By the knowledge of the criminal. In proportion to his clearness of information, should be his avoidance of wrong.

By the peculiar circumstances under which the wrong is committed, which, if they do not entirely take away either the sufferer's caution, or the injurer's freedom of action, may greatly restrain it. But the injurer's ignorance must not be the result of his voluntary act, to

screen him from punishment. Thus, a man who becomes intoxicated by a kind of choice, cannot afterwards claim exemption from punishment for a crime committed whilst inebriated. The greatness or littleness of the temptation, must also necessarily be considered.

Punishment should not unnecessarily render men desperate. It is clear, that in proportion to the offender's degree of guilt, should be the quantum of punishment inflicted on him. And the ever-varying circumstances under which offences are committed, constitute the only sound reason for allowing the exercise of discretion in awarding punishment, not upon all equally, for the same offences, but differently, according to the following circumstances:—

The relative situation of the injurer and the person injured—

In some cases, the dignity of the person wronged—

The place where the offence was committed—

The ability of the offender to bear punishment.

Punishment may also, consistently with its end, be distributed according to the difficulty of preventing and discovering offences.

Crimes accompanied with force should be more severely punished than others.

VI. The subject of the punishment of death has given rise to much discussion. It is, in most countries, applied to the prevention of murder.

Of the punishment of death.

It should never be inflicted unless when it appears to be sanctioned by the laws of reason, nor excepting for crimes highly dangerous to mankind; nor for offences against the repetition of which any lesser security would

be available. It is no objection to it, that crimes of different degrees are punished by its infliction, if the lowest of those crimes require it.

In very atrocious offences, public exposure or anatomical dissection of person may be added to it, in order to gradualise criminal punishment as much as possible; and in order also to render those offences less liable to commission, and the ideas of them more terrible to the beholders.

The benevolent Howard, with a spirit of goodness equalled only by his other acts of pure and disinterested charity, translated from italian into english, the admirable edict which the grand duke of Tuscany issued for the reform of criminal law in his dominions, soon after the appearance of the treatise of the marquis of Beccaria. The circulation, however, of Howard's pamphlet, was unfortunately but of a private nature, and it is now out of print. The regulations laid down in it, are of a character too philosophic, too benevolent, and too useful, to be entirely passed over, in a treatise of universal law. But the limits of this work will not permit me to transcribe the truly royal rules of the edict. I must therefore satisfy myself with referring my readers to the general contents of the work itself, which breathes a spirit of truly christian charity, losing sight of all considerations of self, and centring its glory and its happiness in the lasting good of mankind. The high-minded Peter Leopold substituted for the capital punishment of death, as to men, the infliction of hard labor for life; and as to women, confinement in *Bride-well*(a) for life; which kinds of infliction he termed "the

(a) "*Ergastolo*."

last punishment." In abolishing the punishment of death, formerly existing in his dominions, he declares that "those who are guilty of the crimes formerly deemed capital, and other grievous offences, should continue to live, to atone, by some good actions, for the bad ones they have committed." Only five murders, as it is said, were perpetrated in the dominions of his highness during twenty years; whilst in the neighbouring states, assassinations of the most diabolical kinds were of frequent occurrence. As I have presumed to speak of the merits of the edict, I am bound to add, that perhaps some of its prescriptions are better suited to a small and compact territory, than to a large one.

VII. Punishment is effectual in restraining offences in proportion to its immediate infliction, its certainty, and its intensity.

Of the effectuality of punishment.

VIII. Offenders hope for escape by:—

Non-discovery of the offence.

Non-discovery, after the offence is known.

Not being punished, when discovered.

The inefficacy of the punishment.

Not suffering the full measure of punishment.

Of the hope of escape.

IX. In a state of nature, all men are equal. Superiority, therefore, is not necessary to qualify a person to inflict punishment. All men have an equal interest in restraining the commission of injustice; and any man may consequently punish (*a*), to prevent future crime.

Of the persons who have a right to punish.

(*a*) See Genesis, iv. 14.—Bl. Com. iv. c. 1.—1 Hale, P. C. 13.—Locke on Gov. book ii. sec. 7, 10, and 125.

If, in so doing, he be wilfully wrong, he is answerable to God and mankind. The passions of individuals, in claiming their demands, are seldom uninflamed, and men are therefore very likely to punish unjustly in their own cases. This is unavoidable. And punishment by others is attended with inconveniences. For, independently of an ignorance of the real facts, the offender is, in the latter case, likely to incur a second punishment for the same offence. But any one may, in a state of nature, punish another, provided he has never been before sufficiently punished for the same crime.

Children and apprentices are liable to be chastised by their parents and masters.

*Of the persons
liable to punishment.*

X. Persons liable to punishment are those who are naturally capable of committing crime; and have shown a vicious will; and have done an unlawful act.

*Of the persons
not liable to it.*

XI. Persons not liable to punishment are infants, who, not having attained the age of discretion, do not comprehend the distinctions of right and wrong; idiots, and lunatics; and those who have committed the act through unavoidable compulsion; or through chance, involuntary misfortune, or inevitable ignorance.

Persons should not be punished for mere thoughts, trifling weaknesses, or possible evils. A person's demerit before God is not the proper subject of human trial and punishment. Retribution should never be inflicted in order to gratify the feelings of revenge.

Intoxication cannot naturally excuse from punishment; for that would be to let the commission of one crime save from the punishment of another.

XII. The punishment of retaliation (*a*), as sanctioned by the laws of Moses, was not founded upon revenge. By rendering the evil of the punishment equal to the evil of the offence—by causing the aggressor to feel the injury of his own wrong, offences were prevented. Of retaliation.

But exact retaliation can very seldom be rendered, different individuals being differently circumstanced. To deprive a man with two legs, of one of them, as a punishment for taking away the use of the only remaining leg of a fellow creature, who has been previously deprived of one, is not purely retaliative. To take away fifty pounds from a rich man, is an inadequate punishment for his robbing another of that sum, being all that he is worth.

The system of retaliation often disables for life, and therefore prevents the offenders from exercising their natural duties. To these objections may be added its occasional criminality, indecency, and cruelty.

XIII. Tortures (*b*) are to be justified, as a punishment, only when they are necessary to prevent the criminal from repeating his offence. They are therefore unjustifiable, when the punishment of death is intended to be inflicted. Of torture.

A right to punish does not include a discretion to use criminals as we choose. And the application of torture, under the pretence of deterring others, is barbarous cruelty, inflicted under the name of justice.

(*a*) See Josephus.—Diod. Sic.—Ll. of Solon.—Pott. Ant. book i. c. 26.—Becc. c. 15.—Turnb. Hein. ii. sec. 143.—Montesq. Esp. d. L. liv. vi. c. 19.

(*b*) See Tourreil.—Benth. Fragm. on Gov. pref. p. 23.—Montesq. Esp. d. L. liv. vi. c. 16.—Becc. on Cr. c. 16.

Of the property of criminals.

XIV. Where the end of punishing is accomplished by a deprivation of goods, we may as lawfully resort to that infliction, as to a corporeal one.

Inheritance is not a law of nature; and if it were, it could invest descendants with property only by leaving them in possession of what their ancestor ceases to have an interest in, at the moment of dissolution. Next of kin are therefore not entitled to the condemned goods of criminals.

The person injured has a rigid right only to such portion of the criminal's goods as will repair the damage sustained. But the punisher who deprives an offender of his right to his goods, may claim them as the first occupant.

Punishment does not descend.

XV. The legitimate end of punishment shows that it does not, properly speaking, descend to children or relatives. Guilt is a personal thing. The punishment of the criminal often entails inconveniences upon his connexions; but this is, from the constitution of things, unavoidable. Accidental connexions will occasionally cause natural misfortunes, as well as natural benefits. All punishments are losses; but all losses are not punishments. All inflictions will, more or less, affect the aggressor's connexions. The fulfilment of the children's expectations is subject to the conduct of the parent.

Of the punishment of accessories.

XVI. Accessories (*a*) are liable to punishment, in proportion to the evil disposition which their acts evince. Their degrees of guilt have been detailed in the fourth section of the last chapter. Accessories can never be guilty of a greater crime than the princi-

(*a*) See c. 12, sec. 4.

pals. They should generally receive the same punishment, if their acts shew an equally evil disposition. It is a false principle always to consider the guilt of an accessory in the highest degree—that of command or instigation, as greater than the guilt of the principal; not only because an act of outrage is generally more decisive of will, than an open desire that outrage shall be committed; but because also the instigator is often under the influence of a provocation, which does not affect the actual aggressor. But, in the estimation of guilt in this case, as in all other cases, the relative situation of the parties must be considered. If a father deny to his young children food at home, and command them to go out and steal, he is more to be condemned than they. He breaks his duty to his children, as well as to society: they only commit theft.

XVII. Any man may, so far as he is individually concerned, naturally remit the punishment of another, but not the satisfaction due to a third person, for damage sustained. Of mercy.

Mercy is shown either by pardon, or complete remission; or mitigation of punishment.

Mercy is lawful, as the law of nature does not join punishment, but only permits it. We have moral power to inflict it. The criminal has no right to demand it. By extending mercy, we give up our right, but do not break an obligation.

Mercy should, above all things, be extended to those who have eminently benefited mankind; for they who are entitled to our warmest gratitude, have the highest claim to our favorable consideration. Cle-

mercy should be very cautiously exercised as to crimes of cruelty. It should not be extended, if the offender have frequently been punished in the lesser degree, without avail. And it should not be withheld on the ground of the offender having frequently committed the same offence, without having been punished for it; for that fact furnishes no evidence that if he had been punished in the lower degree, he would not have been prevented from a repetition. Nor should it be shown on the occasion of offences either very common, or very easy of commission; for they are more likely to be committed. It should be liberally extended towards those who have voluntarily tendered reparation, or shown manifest repentance. Unreasonable compassion is cruelty to the injured. False mercy, then, is an offence against justice.

CHAPTER XIV.



OF PRIVATE WAR AND PEACE.

§ I. JUST war is the state of contention by force, resorted to after satisfaction is refused, for the recovery of rights (a), by those who have no peaceful way of obtaining them, against those who have done, or are doing us injuries. Definition & nature of it.

War is impolitic when its inconveniences more than counterbalance the good sought by it. We should undertake war, only in order that we may secure peace. It is always justifiably exercised, when opposed to unauthorised force, excepting in the case of insignificant wrongs, which it is unreasonable to set life, limbs, or liberty, in competition with. The exact point at which violence shall commence, must be determined by the exercise of reason, well weighing the consequences of resistance, and the effect of yielding unresistingly. Every man is the natural judge of his own resistance.

(a) See Erasmus, contra.

What war is
lawful.

II. The law of nature, giving to us all essential remedies for the recovery of our rights, allows us to resort to war, if it be necessary for that purpose. The security of the innocent is preferable to the impunity of the guilty. He who, by using force or fraud, with an evil end, infringes upon the rights of a man, puts himself into a state of war against him. But all war which is not absolutely requisite for the restoration of rights, and which is not preceded by a demand of compensation, and conducted by way of remonstrance, and with mildness, is unlawful; for it inflicts causeless harm. And if compensation be given or tendered, a subsequent war is unjust.

Who may en-
gage in it.

III. Those who may lawfully engage in war are:—

1. The party immediately injured.
2. His children, if forming a part of his family, they being bound to obey their parents' lawful commands; and his servants, who have engaged to serve him in all his lawful requests.
3. All others, for his assistance; if, declaring that he is of himself insufficient, he require help; for there is nothing unjust, but the contrary, in aiding another to recover his rights.

The degree of
force lawful.

IV. Enemies are naturally supposed to be bent upon doing each other all possible harm; but the duty of humanity requires, that so much injury only as is essential to the attainment of the object of the war, shall be committed. Forbearance towards enemies, so far as is consistent with a moderate regard for our rights, is imperative upon us.

We are not at liberty to inflict enormous mischiefs, in defending unimportant rights. Preservation of life is an important law of nature.

A man may not cruelly kill, torture, or enslave his enemy, after taking him prisoner. But, for the sake of self-preservation, he may prevent his doing injury to him, by any means absolutely necessary for the purpose.

CHAPTER XV.

OF SLAVERY.

Definition &
nature of it.

§ I. SLAVERY is a state of obligation to submit absolutely to the direction of a particular person, or particular persons, so far as the law of nature permits.

Limited slavery was permitted in the Mosaic dispensation^(a). The authority of a parent and of an absolute master, is separated by this remarkable distinction: the former is for the benefit of the child; the latter is for the benefit of the master.

Lawful causes
of slavery.

II. It may, at the first intellectual glance, seem contradictory to maintain that no man is naturally a slave, whilst thousands are slaves from the moment of their birth. But they are so accidentally: not because the laws of nature have made them so.

Slavery arises from the following causes:—

(a) See Exod. xxi. ver. 2 to 7.

1. The disposal of parents. I have before shown (*a*), that parents may dispose of their offspring, if necessary for their maintenance.

2. Birth, which in fact is a modification of the former right. Slaves being unable to support their offspring, their masters are the persons to whom they are, for the sake of their maintenance, disposed of. Added to which, is the consideration of the loss of the master, arising from the gestation and parturition of the mother.

The duration of these two kinds of slavery is so long as the master is unrepaid what the acquisition and maintenance of the slave have cost him, either by labor, or in specific value. The indefinite period of life, ascribed by some jurists, to this kind of slavery, is, I think, wholly unfounded.

3. Individual consent: for every man may dispose of all his alienable liberty to another (*b*).

4. The obligation to make such reparation for an injury, as can be accomplished by no other means. The injured party, in that case, may demand the continued services of the aggressor himself: or he may require him to serve another as his slave, for a compensation to be paid to him; but if the price exceed the amount due for the injury, the slave is entitled to the remainder.

(*a*) See c. vi. sec. 6.

(*b*) See Montesq. Esp. d. L. 15. 2.—Grove's Mor. Phil. c. 16. sec. 10.—Turnb. Hein. ii. sec. 80.—Ward. i. p. 80.—Spav. Puff. i. p. 251.—Ruth. Inst. i. p. 149.—Agesilaus, Plut. Apoth. Lacon. p. 190.—Pausan. lib. vii. c. 5.—Arist. Pol. i. 3.—Tac. Ann. 4. 72.—Cæs. de Bel. Gal. 6. 13.—Van Eck. Princ. Jur. p. 92.—Turnb. Hein. ii. sec. 77.—Genesis, ix.—Contra: BL Com. i. c. 14.

5. Guilt.—Slavery will deprive the criminal of opportunities of repetition of crime; and if necessary for that purpose, its infliction is justifiable. It may also be inflicted in commutation of the greater punishment of death.

6. Just war(*a*), in those cases in which the end properly sought for, cannot be obtained without slavery.

No man is a slave, on account of his physical or intellectual inferiority. I ought not to feel diffident, because, in declaring this very just principle, I am opposing an ancient philosopher(*b*). The same doctrine, if once permitted, would be necessarily extended to sanction the slavery of women.

The rights
of proprietors
of slaves.

III. The rights of proprietors of slaves are:—

To their perpetual or limited service, according to the circumstances of the case, and therefore to their unlimited obedience to all their lawful commands—

To the children of female slaves, subject to the rules laid down in the second section; as the product of the body belongs to its owner—

To all their property, excepting such as they are allowed by their masters to have; for having a right to direct their actions, they have also a right to declare how their property shall be disposed of. The sale of natural freedom irrevocably vests in the slave the price of his mancipation, which his master cannot lawfully deprive him of—

(*a*) See contra:—Bl. Com. i.—Ward.—Hallifax.

(*b*) Aristot. Pol.

Of transfer—

To a compensation for wilful injuries which they have done to their masters—

To turn them away, if incorrigibly inattentive to their duty.

IV. The rights of a slave are:—

The rights of slaves.

To life, the right to which is inalienable—

Of obedience to all the laws of nature, which no captivity can release him from; and from which, therefore, his master cannot restrain him—

To maintenance, and clothing, and to the enjoyment and disposition of such property as his master has given him liberty to possess; but subject to the limitations annexed to the licence. He cannot be put to work for which he did not bind himself, if his slavery be voluntary. The master is bound to observe the restrictions with which his right of dominion is burdened. He may, with reason, claim to be supported when sick or impotent—

To exemption from all causeless harm. If a master cruelly torment his slave, so as to render his life burdensome, he may, by force or flight, extricate himself from such intolerable misery.

V. The child of a female slave is subjected to captivity from the moment of its birth, in consequence of the master's loss from the gestation and parturition of the mother, and the maintenance of the child itself. But the child of a female free woman, although begotten by a male slave, is free; for the same reason will not apply.

Of the children of slaves.

The causes by which, and the time for which, children become slaves, through their parents, are above detailed.

THE END OF THE FIRST BOOK.

BOOK II.



THE LAWS OF NATIONS.



INTRODUCTION.

THE laws of nations are those public rules which the laws of nature (*a*), injoin for the due government and mutual intercourse of states.

This definition of the term is of a more extensive nature than is generally given; but it appears incorrect to confine it to the mere customs of countries, as is sometimes done (*b*).

The laws of nations are as capable of demonstration as those of nature; although they are sometimes of a more intricate description.

It would have been impossible to treat, with any degree of accuracy, of this branch of the subject, without having first developed the institutes of natural law;

(*a*) See contra:—Grotius, Huber, Suarez.

(*b*) See Grot. de J. B. & P. l. 1. 14. 1.—Suarez de Leg. ac d. Legisl. lib. ii. c. 20. sec. 6.—Burlamaq. ii. p. 3.

on which all national and international law must be founded. From the principles of natural law, stated in my first book, it will appear how necessary a knowledge of that branch of jurisprudence is, to enable us to form clear conclusions as to the rights and obligations of men. The natural law still applies to all who are not members of civil societies, if any such there be. The positive laws established in particular countries are distinctive, and not universal. The law of nature must therefore often be resorted to, as the rule of justice, between members of different states. Members of societies are permitted to exercise their natural liberty, in those cases in which the civil law has not restrained them. As all civil laws are founded upon the law of nature, a knowledge of the latter is essential to the right understanding of the former. Civil laws are often so arbitrary and undefined, that, in many cases of individual application, they cannot be well interpreted, or their just operation ascertained, without referring to the law of nature. The obligation of civil laws depending partly upon the consent of those who are subject to them, it is impossible to ascertain correctly the extent of that obligation, without knowing how far we may, by civil concord, supersede natural rights and duties—what degree of power we can surrender—what new advantages we can acquire—and what is the general difference between a state of nature, and that of civil subjection.

CHAPTER I.

OF CIVIL SOCIETY IN GENERAL.

§ I. A CIVIL society, or sovereign state, is an independent body of free persons, united by reciprocal consent, for the purpose of honest deliberation and judgment; forming one compound person, and using the common force for the common good.

Definition &
nature of a civil
society.

The term 'honest deliberation,' appears a necessary part of the definition; for without it, the description might apply to a band of robbers, or a horde of pirates.

In other words: a civil society is a national body of men, modified for its own good, and the good of other countries, by the presidency of a sovereign, or governing will.

It is consistent with all the dictates of nature to live in society. In applying the natural law to civil bodies, we should consider in what respects nations, although moral persons, are not exactly the same as mere individuals. Every body politic is, in its internal and external transactions, to be considered as a moral person. It is not necessary to a state that the citizens should be fixed to any particular spot of ground.

It is sufficient that they are independent, and united for self-preservation and security.

Origin of it.

II. The influence or pattern of the parental authority, and the general inconveniences attending a state of nature, especially as human knowledge advanced, gave rise, it is probable, to the formation of national assemblies, or states, by which men were enabled to afford to each other mutual support. Continually-disputed questions arose concerning property. The fear of private punishment and wicked attacks, from which the strict and regular measures of public circumspection is an admirable preservative, was constantly apprehended by individuals. The oppressive combinations of vicious men called for the protective coalitions of others, to resist their attacks.

In proportion to the increase of population, must such reasons prevail; and they are of so powerful a character, that it is not easy to conceive that many individuals would ever live long upon the same track of land, independently of each other, and without associating for common advantage; although I dissent from the opinion of Plato(*a*), that it is utterly impossible.

Grand object of it.

III. The grand object of civil society is, as much as possible, to lessen the pains, and enlarge the pleasures derived by men from one another. In other words, to ensure the greatest possible happiness of the greatest possible number, by guarding every man against the oppression of others, and adopting such public mea-

(*a*) De Leg. lib. iv.—See Aristot.—Barbeyrac on Grot. sec. 7.—Puff. book vii. c. i. sec. 5.—Hom. Odys. ix. v. 112.

sures as tend to the lasting advantage and safety of the commonwealth. Society secures to individuals that enjoyment of their natural rights, which cannot exist but in communities. All its laws should therefore be consistent with natural justice.

IV. From the definition and origin of civil bodies, it is obvious that mankind neither does, nor can consist, of one large collective society. The peculiar circumstances and interests of different individuals, the separating distances of places, and the aqueous and mountainous boundaries of the world, render such an event, after men have multiplied, impossible. The motives of self-defence and enjoyment would never lead us to unite in one congregative body, even if it were practicable. It is sufficient for the purpose of a subject, if the state to which he joins himself, be strong enough in itself to resist the attacks of power from without.

Mankind is composed of several civil societies.

The varied wants of individuals have thus given rise to a number of political bodies.

V. Every state, however unequal in size, power, or elevation, even if it have reposed itself upon the protecting alliance of a more powerful one, retains its separate right of government, until it has voluntarily divested itself of its sovereign independence. Neither the paying of homage, tribute, or honorary acknowledgment, concurrence of sovereignty in the king of another state, nor voluntary confederacy, however constant, deprives a nation of its independency. Absolute cession of power is necessary for the purpose.

Equality and independency of states.

When that occurs, the formerly-individual state ceases to be a separate moral person.

Civil subjection, the result of compact.

VI. No man can be supposed to part with his natural rights, without his consent, either express or implied. Men are originally born equal; and the free obedience due to government must therefore arise from express consent, or tacit usage. It is to that consent alone, then, that his subjection to civil authority is to be traced. The principle of compact has been erroneously opposed by the theory of fear. An immense number of men cannot be kept in constant and submissive subjection by a few. In the present state of the world, men are seldom or never born in a natural condition. But it is not unfair to consider their parents to have chosen, for them, that they shall be members of the society. It is objected to compact, that no man can lawfully agree to supersede his natural obligations. This is undeniable. But the most despotic governor is bound to follow the laws of nature. And if he order his subjects to do what is contrary to them, they have no moral power of compliance. They may, both morally and civilly, then refuse to obey him. They are, in fact, bound to disobey his immoral injunctions. Many have fallen into errors of this kind, from an incomplete consideration of the subject of despotic government(a).

Locke(b) maintains that a child is not born the sub-

(a) See ch. vii. sec. 9.

(b) On Civ. Gov. book ii. sec. 116 to 119, and sec. 191. But see sec. 171.

ject of any government; but yet it is not contrary to reason to suppose a child to owe allegiance, from the instant that the state affords to it protection, and it can exercise the volition of civil obedience.

A child is protected before it is born, in life, which is the highest kind of protection; and in property also (a).

It is contrary to civil law to give protection without the right of obedience, if the party protected can possibly render it; and the supposed infantile freedom from civil restraint therefore, in many cases, implies a political absurdity. The child's consent may be fairly presumed to a submission essential to his civil protection. For when we are born, we must put up with the circumstances of our birth, whatever they may be, for better for worse. If, when we acquire a judgment of our own, we dislike the regulations of the state, and desire to leave it, we shall seldom be prevented from doing so, even if we have consented, in some way, to be a subject of it. And if either the will of the government, or accidental circumstances prevent us from emigrating to a clime more congenial to our feelings, we must attribute our loss rather to natural misfortune, than to national injustice. No state could exist, if those who were born under its protection, were at liberty to disclaim its authority, upon the pretence that they had never consented to obey its rules. And the apparent hardship can seldom exist to any serious extent; as the revolving events of mankind are continually presenting opportunities for voluntary emigration.

(a) See book i. c. 3. sec. 1.

It is extremely difficult, if not impossible, now to trace a people's first consent to be governed.

The duty of
the members
to advance
the general
good.

VII. Our natural duty of serving others with equal benevolence, *cæteris paribus*, arises from no other reason than the circumstance of their being human creatures. But in a political condition, we should consider our private interests to be identified with those of our civil society, which cannot be preserved, if each member of it attempt to monopolize power and aggrandisement to himself.

For a man to injure human society, is contrary to his civil duty—

For a man to consult his own interest, distinctly from that of society, is to injure it—

Therefore, for a man to consult his own interest, distinctly from that of human society, is contrary to his civil duty.

As there are many radii, even in a small circle, so are there many modes in which the patriot can, in the humblest situation of life, exhibit his devotion to the common interests.

It is obvious, that every member who opposes the laws, and therefore the ends of society, is guilty of a public wrong; and subjects himself to punishment. Subjects are bound, at almost any sacrifice, to consult the peace, interest, and safety of their state; to honor it; and to behave most respectfully towards its sovereign, and ministers (*a*).

Sacrifice of
life to one's
country.

VIII. The question, whether a man may voluntari-

(*a*) See Spav. Puff. ii. p. 349.—Burlamaq. i. p. 169.

ly sacrifice his life to his country, may be thus decided:—The duty of man to God must always prevail. When self-love and sociability conflict, that is to be preferred which produces, in the general scale of nature, the more real good or usefulness; but if their interests be equal, self-love, as the more naturally inherent principle, must sway the balance. The life of the head of a family is to be regarded as more valuable than that of another person, unless the state sufficiently provide for that head, in the event of his death. A state cannot exist without men who will hazard their lives in its service (a). Our country's safety, more or less, always involves our very lives, as well as our general interests. A man may, by adopting some useful employment, shorten his life, consistently with morality, by doing a greater good than he would have done, had he existed longer otherwise; for utility is the grand end of natural and public law. No one would say, that 'it is not useful to consult utility' (b). We may hazard our lives to save people who, compared with ourselves, with regard either to number or value, are more precious, in the scale of society.

IX. In all deliberative societies, the opinions of members must be:—

The acts
which bind
the members.

Unanimous; or—

Unequally divided; or—

Equally so.

(a) See instances of Codrus, Leonidas, Curtius, the two Decii, Joan of Arc, and Arnold de Winkelried.

(b) See Bentham's *Fragm. on Gov.* c. 1.

In the first case, all the members are obviously bound by the consequences of their own act. In the second instance, the rule, that the opinions of the greater number shall prevail, is consistent with the tacit consent of the minority, that such rules of reason and equity as are necessary for carrying the objects of the society into effect, shall be conformed to. Unanimous consent can seldom be expected; and the general interests cannot prosper, if the will of the lesser number prevail. The majority of votes of the whole society must, however, clearly appear, and must not be inferred by doubtful implications. It may be specially or impliedly agreed, that the majority of voters shall be considered the majority of the whole society. But then the majority of votes on the particular question must not be of a doubtful character, so as reasonably to impress the opponents with a doubt of its existence.

If the votes be equal in number on each side, no change is effected—nothing is done—the matter remains precisely in its former state; unless, by express or tacit consent, a casting vote be resorted to, which in that case binds the whole.

All who have a right to vote have also a natural power to appoint an agent for that purpose, who is called a proxy; unless prevented by special agreement of the body. But no proxy can be allowed for a proxy; for the agent must stand in the immediate place of his principal. If a member be absent and do not appoint a proxy, it is to be inferred that he intends to adopt the opinion of those who attend and vote.

X. The equality of men, in civil society, consists not in an equality of possessions, rank, or talents; but in being equally subject to, and protected by, the laws.

Of political equality.

XI. As the principles which govern the civil power, cannot be supposed to lead to, or sanction its own destruction, men are not unrestrictedly at liberty to leave their country.

Of voluntary separation from a society.

The exercise of such a licence would destroy the strength of the body, by lessening its resources and means of self-protection. Society has an interest in the membership; for it is in the collective assistance of individuals that the power of the state consists. By becoming a member of it, a man has laid himself under an obligation to assist in its protection. No member is, therefore, at liberty to depart, without the express or implied consent of the general body.

Political consent cannot be implied, with regard either to an individual of high importance to the state, or to a large body of persons: the loss is then too great to raise a presumption of assent. Nor can it be presumed at all, in times of severe public distress (*a*); for then the presence of every individual is important to assist in removing the pressing emergencies of the times. No member is at liberty to leave the country, upon the ground of injustice being done to him by the government; unless the act complained of manifestly show, to disinterested men, an indisposition on the part of the state to perform its obligation of protection; in which case the

(*a*) See Larcher's note on Herodot. lib. viii. sec. 41.

duty of the member, as the other party to the compact, ceases.

Of compulsory
banishment.

XII. A nation may, however, if necessary, banish an individual, who has transgressed its laws, from its territory, in order to deprive him of the opportunity of again offending against its peace; or it may, with his consent, inflict on him the pain of exile, in commutation of capital punishment. During the time of banishment, he is liable, in respect of allegiance, only to the state in which he takes up his new abode. But at the expiration of his term of banishment, the suspension ceases: the state is obliged to protect him, and he is bound in subjection to it. If, however, the banishment be for life, it amounts to a final and positive excision of allegiance; and he is no longer bound to obey the laws, or consult the interests of his mother country.

Of allegiance,
and of natives
& foreigners.

XIII. Allegiance is the duty which a man owes to the public body to which he is subject.

Protection of the state, and allegiance of the subject, are always correlative and contemporary. One cannot exist without the other.

All who are born within the limits of the state are natives of it, and are bound to observe their allegiance to the civil power, from the moment of their birth, in return for the protection which they receive. This obligation equally exists, whether they have sworn to exercise allegiance, or not: for it is not the practice, nor is it practicable, for every subject formally to pledge his faith. And such pledge is but a cor-

poreal declaration of a previously-existing tie. No man can forswear his country. Allegiance to the state where we were born, lasts until death, wherever we may be, unless—First, it be expressly released by the sovereign power. Secondly, where the party is impliedly released; as, if he reside in a previously dependent colony, but established as an independent country; which is the case in the United States: the person then becomes an alien. Thirdly, where the state refuses to the party its protection.

A king cannot, of his own mere will, nullify a subject's right to protection: for such a power would render men liable to continual evil(*a*).

All persons who are not born within the state, are aliens(*b*), unless, by the operation of a particular law, they be naturalized.

There is this difference between a native and an alien: the former is related only to his own state, but the latter, at the time of his departure, most probably owed allegiance to another government. So long as he remains in his new place of habitation, he is bound to conduct himself according to its law:—the condition of sufferance on which alone he can be allowed to remain there. This is called temporary allegiance(*c*). But he does not become a member of the state, without its express recognition; in return for which he pledges his allegiance. He cannot therefore hold land; for, as I have before shown(*d*), he is naturally incapable of

(*a*) See contra:—Chitty Jun. on Prerog. c. 2.

(*b*) See c. 10.

(*c*) See Bl. Com. i. c. 10.—7 Rep. 6.—Dyer, 145.—Hob. 271.—2 Salk. 630. pl. 2.—1 Hale, P. C. 59.

(*d*) See book i. c. 2.

doing so, until formal admission. If, however, the new comer be received into the territory, after he has left a state of nature, and consequently owed no allegiance, he is entitled, upon reception, to all the privileges of the government, unless it formally reject him, by some positive law.

Alien enemies have no right to civil protection. :

CHAPTER II.

OF THE MODIFICATIONS EFFECTED BY THE LAWS OF CIVIL UNION.

§ I. IT has been shown in the first chapter of this book, that the rights attendant upon a state of nature, are materially modified, when men enter into a state of civil society. It will now be useful to inquire into the particular nature of the modifications so effected.

General nature of change.

The two great objects which men have in view, in joining society, are, security against injuries, and advancement of the general good; and as those ends can be attained only by submitting to the laws, which it is incumbent upon every civil collection of people to make, men are bound to obey the legal restraints imposed by the people, however rigorous.

The civil state, well administered, improves, but, in result, does not abridge, the natural liberty of man. The restrictions of civil law should not, excepting so far as it is absolutely necessary, oppose the natural rights and feelings of mankind; and they should always be consistent with the fitness or reason of things.

In a civil condition, a man is at liberty to use his force only in the assistance of the common power.

There are natural duties, such as benevolence, independently of the obligations of civil law, which we are morally bound, in a national state, to perform, but which the social law cannot reach; for they are too voluntary, indefinite, and imperfect a character, and they are, besides, not sufficiently of a statistical nature, to be, with any degree of safety, rendered the subject of judicial control and punishment. They are too numerous and obvious to require particular detail, and are of an imperfect kind.

Of civil jurisdiction.

II. Civil jurisdiction is the right which a society has to decide any matter of controversy, between two persons or more; and afterwards to oblige them, by means of the common force, if they refuse to do so voluntarily, to obey such decision, according to the pre-established laws of the state.

It will appear, from this definition, that all jurisdiction of a civil nature must be over persons. It is unnecessary to subdivide it into that over persons, and over things, as learned commentators (*a*) have more ingeniously than correctly done. For as all judicial decision relates to the obedience and rights of persons; there appears to be no occasion for confusing the subject, by supposing inanimate agents of submission to the public authority.

There are many powers of jurisdiction, which the mere act of civil union does not invest the society with; but as that act necessarily involves consent to obey all

(*a*) See Spav. Puff. i. p. 292.—Hale's Anal.—Hallifax.—Kant.—Paley.—Rutherford.—Blackstone.—Degerando.

the public laws, their observance is peremptorily binding.

We are bound to submit to the civil jurisdiction, in matters of contention with other members of our state, because we and those to whom we are opposed in respect of any thing, are under its protection, and because we have agreed that the individuals with whom we are in dispute, shall have the benefit of our obedience to the civil authority. For, by the very act of acquiring a right to our own public protection, we obviously concede a similar right to the other members of the same society.

The subsistence of civil jurisdiction is simultaneous with the protection which the society owes to both the contending parties. So soon as the right of protection ceases, the political authority is determined; for it is then morally impossible, in other words, it would be actually absurd, for the person threatened with injury to insist upon protection from the state.

III. It has been before shown (a), that men who enjoy natural liberty, may demand reparation, and inflict punishment for actual personal injuries; and may take measures to secure themselves against meditated attacks. But, in a state of civil subjection, the magistrate, and not the individual, is armed with these powers. We resign the power possessed in a state of natural liberty, in order that we may enjoy the higher and more equitable advantages of sober and reasoning legislation, which, if properly constituted, and well dis-

Restraint upon private defence and security.

(a) See book i. c. 12 & 13.

posed, will inflict no needless severity, and impose no restriction which does not tend to the public good.

The many nice distinctions which ingenuity has drawn, as to the nature of the civil restriction on personal defence and security, may be sacrificed to the establishment of the following general principles:—

1. The aggressed has surrendered the use of his own strength, to that of the common force, under the regulation of the common judgment.

2. The society, by receiving him as one of its members, engages to protect him against any causeless harm. The state is also bound to protect the aggressor against any unnecessary attack, highly provocative affronts, or meditated violence, which the civil laws do not, in their wisdom, permit; for the assailant, as well as the party assailed, has a right to that common protection which each has assented to. The civil restraint upon defence presupposes each party to be under the jurisdiction of the same code, the consent of the aggressed that the aggressor shall have the benefit of civil protection, excluding the former from the exercise of his natural right of defence. That consent was expressed on the instant that the aggressor became himself entitled to a right of protection. The society has therefore a right to judge, whether in any, and if so, in what cases, individuals shall still be permitted to exercise private defence; and to what extent also private force shall be used, if at all.

3. As mankind have agreed to surrender so much of their natural liberty as the social union requires, and no more, their natural right of personal defence still exists in those cases to which the control and power of

civil jurisdiction do not extend, or on the occasion of which the magistrate cannot come to our protection, in sufficient time to avert it. This is called 'a cessation of civil jurisdiction, in fact.' For we may defend ourselves in a situation which absolutely precludes all civil protection. Otherwise we should be entirely without the means of defence against an injury or threatened attack, which neither natural nor social law ever intended. But even on occasions of this kind, a man is not left to the uncontrolled exercise of his natural liberty. He may not, to avert a trifling or reparable injury, kill or maim his adversary. Injuries which civil jurisdiction will compel the aggressor fully to repair, are not to be made the pretences for exercising the freedom and remedies of a natural state. But where the injury threatened is, either in its own nature, or accidentally, irreparable, summary justice may be inflicted by the party attacked. Of this kind are the loss of life and of chastity, the attacks of persons who never can be identified, and the attempts of thieves, against whom the political authority cannot interpose, in such a way as to obtain restitution of the goods. In all such cases, the right of private defence exists, so long as the impossibility of obtaining the magistrate's protection lasts. There is also 'a cessation of civil jurisdiction, of right,' between those persons who are at sea, or in any place where there is no civil society. If they be within a public territory, even but for a time, and as aliens, they are so long in union with it; and, as I have before shown (a), must submit to its government.

(a) See c. 1, sec. 13.

4. The right of personal defence may be exercised, where the assailant is waging unjust war against the state, and he cannot be punished by the magistrate. For every man has, in one sense, an equal interest in the country, and may vindicate such of its rights as must inevitably be sacrificed without his interference.

5. If we be refused redress by all the executive officers of a state, for a supposed grievance, we have no power to arrogate to ourselves a personal right of redress; for we are bound by the judgment of the society. Discretion must be vested in all judicial officers. Confidence must therefore be placed in their decisions. Applications for remedies are often made to magistrates unsuccessfully, in consequence of the charges being regarded by them as frivolous, uncertain, false, malicious, or ungrounded. But it is not the less our duty to submit to judicial decisions, made by honest judges, because they bear an unwelcome character to us, who are the interested parties.

Restraint on
individual re-
paration and
punishment.

IV. A correct knowledge of the limitation of personal defence, and particularly of the ground of it—mutual submission to protection, will lead us to form just ideas of the restraints imposed, by the establishment of civil society, on the natural rights of reparation and punishment.

And first, of reparation:—The establishment of civil society in general restrains us from using any private force to obtain reparation. The judges of the land have the right as well to judge of our claims to reparation, as to enforce, by their officers, those claims, so far as the laws declare us to be entitled to them.

The right to obtain reparation is thus not taken away, but modified. The impossibility of obtaining reparative redress, much less frequently occurs than the possibility, for civil reparation can generally be effectually demanded at any time after the commission of the injury. We are not at liberty to insist upon private reparation, if the laws of our country be insufficient to render us either supposed or real justice; for a wrong which is not made out to the magistrate's satisfaction, is, politically speaking, no wrong at all; and if we take upon ourselves, in a state of society, to inflict private retribution upon a person, for that which is not recognised by the civil law, as an injury, we do him causeless harm.

We are therefore, at the most, only at liberty to stop the offender's person, or goods, and both, if necessary, if he be on the very eve of absconding from the country, with his goods, for the purpose of evading the civil interference. Otherwise justice cannot thereafter be rendered to the sufferer. But in this case the power ceases with the necessity; and the goods or person are transferred to the custody, not of the individual claiming redress, but of the law, represented by the magistrate. And even the right which I am asserting, reasonable as it may appear, is denied by many human tribunals, in cases in which the right of reparation, and not of punishment, is demanded.

Of the same nature with the restraints upon private defence and reparation, are the rules of limitation upon individual punishment, in a state:—

An individual is not at liberty to inflict punishment on a subject of the same state; because the general submission to the civil judgment restrains him, and the

principle of mutual protection immediately operates. The state, instead of the individual, exercises the liberty of nature, armed with united powers, of which the offended person has the benefit; but, as it must be presumed, using its strength impartially, and without oppression. The right of private punishment is not taken away, as to its spirit and object, by civil union. It is vested in the common body for the general benefit of each member composing it. Individuals are thus punished publicly, instead of individually. Punishment is publicly awarded, when an offender has shown a disposition to commit injury; as that disposition concerns the people, in contradistinction to reparation, which is decreed for damage done to particular individuals. In the former instance, the public only can remit the infliction; in the latter, none but the private persons concerned. If the offender be on the very eve of making his escape, under such circumstances as totally preclude his being stopped by the civil jurisdiction, the offended party may detain him safely, and hand him over to the civil power; and if such caption be resisted by force, it may be supported by the same means. But the complainant is not at liberty to inflict punishment, because he happens to have the defendant in his temporary custody, as *locum tenens* for the executive officer.

The punishments inflicted by the executive power, should be consistent with the before-stated principles of punishment enforced by the law of nature; for the medium by which that law is administered, rather than the law itself, is abrogated by the establishment of society.

It is the duty of civil jurisdiction, to take care that

individuals do not commit causeless harm, under the pretence of obtaining fair reparation, or of inflicting just punishment; and to restrain all unauthorised individual assumptions of power, by such penalties as are necessary.

V. The civil law may modify or restrain that natural community of property which discourages labor, encourages controversies, and is productive of so many other inconveniences.

Alterations & modifications as to property.

In a government, it is contrary to the general compact, for an individual to appropriate to himself any portion of the general territory of the community, without its consent; for it is joint, and not common, property. But the government cannot take away the property of an individual, without his open or implied concurrence.

In the case of extreme want, the party should apply to the civil authority for relief, if he have power to administer it.

Property is sometimes vested in individuals, by modes of acquisition peculiar to public law.

The political power may so regulate the possession of slaves, as to carry into more complete effect the objects of the social union; but it is bound to have the master's benefit in view.

VI. But that the magistrate may punish for actions(a), for which individuals in a state of nature may not, is plain from the difference between a natural and a civil condition. It cannot be maintained that no ac-

Acts punishable by civil power, which are not so by individuals.

(a) See Bynk. Quæst. Jur. Publ. c. 18.

tions are civilly unjust, which are naturally just; if there be actions which injure in a state of society, but which are inoffensive in a condition of nature. Social rights being in many respects different from natural ones, there must be a corresponding difference of obligation, and scale of punishment.

Actions of the kind now under consideration are such as levying war against the country, or its duly-constituted head, disputing the political power of the king, and smuggling-acts, which tend to dissolve the civil bond, and to set at dangerous defiance the public good.

Want of benevolence, in the absence of any positive rules of legal enforcement, is not punishable by public tribunals; because it is not a breach of a perfect right.

A celebrated author^(a) has maintained, however, that when provision for the poor is strictly enforced by the laws, its neglect is civilly punishable, as a breach of charity. This appears to be an inaccurate position. I apprehend, from the author's language, that he could only have had in view such assistance to others, as the law not recommends, but enforces, which enforcement implies, politically speaking, a specific and perfect right. I do not conceive how benevolence can be properly said to operate individually, where a man is forced to pay such stated contributions for the public good. The levying at law of poor-rates, is rather providing for public exigencies, than enforcing the practice of private benevolence.

A very learned writer has, with a want of precision

(a) Rutherforth. Inst. ii. p. 213.

unbecoming his high talents, asserted the doctrine, that paying a fine for a civil transgression, not a natural one, discharges the violator from all fault, and in support of it, has instanced the game-laws—an extreme illustration, and one, therefore, which even if it have weight in itself, cannot be applied to the generality of cases. Every man who enters into society engages to advance its interests; but according to Blackstone, he might, with moral impunity and innocence, injure his country to a great extent, and reasonably satisfy his conscience, by paying the fine annexed to the offence. The circumstance of game being liable to be seized, by men in general, in a condition of nature, does not justify the seizure of it, when that seizure is prohibited by the effect of compact, which is the foundation of social obligation. There are actions injurious in a state of civil order, which are not so in a natural state, and surely it can never be contended, that the commission of them is completely subject to moral impunity. Civil inconveniences are seldom compensated by pecuniary fines. Blackstone assumes that there are *mala prohibita*, without any intermixture of moral guilt, and draws his own conclusions from premises which he never could have proved, but which he takes for granted. He then proceeds to exempt from the operation of his rule, those cases, in which there is any degree of public mischief, or private injury, as if it were permitted to subjects to speculate and theorise, at pleasure, upon those laws which it is their duty to observe, and as if the breaches of public law were not essentially considered as public mischiefs. Of a more rational nature was the opinion of Mr. Justice Rooke (a), when

(a) See 2 Bos. & Pull. 375.

he said: "I perfectly concur in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it pregnant with mischief. Every moral man is considered as much bound to obey the civil law of the land, as the law of nature." It is unsafe to repose in subjects the liberty of choice, with relation to matters connected with the public welfare. In proportion as individual feeling is consulted, is the general good neglected. Determined adherence to the laws is far more serviceable to the state, than the payment of pecuniary mulcts, incurred for their infraction. The one confers active benefit; the other produces a negative good, greatly counterbalanced by the evil accompanying it.

Of the civil
regulation of
marriage.

VII. It is for the interest of married persons, and therefore of society, that public forms of marriage should be celebrated and recorded, in order that the identity of the married persons shall be clear, and easily determined.

The laws of most countries consider the husband and wife as one person; and do not permit the latter to institute suits, even as to property limited to her separate use, without her husband's concurrence, expressed by his suing with her. The civil law usually vests her property in him; and renders him liable to her engagements contracted before marriage.

The children of the wife are, during the existence of the marriage, taken to be the issue of the husband, unless it be clearly shown that there was no access, within the natural time.

It has been urged, that if a male and female make a bargain of matrimonial cohabitation, the political law cannot justly separate them. But a very cursory glance

at the marriage institution, in a political state of existence, will rectify this erroneous argument. That the social law has no fair right to separate a husband and wife, is admitted: but it is another question, who shall, in society, be considered to be husband and wife. Full political age to judge, or the capacity-supplying consent of the parents, expressed in the mode ordained by the municipal law, is necessary to render the supposed engagement obligatory between the parties. The law of God has not decreed any particular age of discretion. The legislatures of different countries may therefore determine the precise period, according to the climate and circumstances of their particular and varying regions. The fanciful pretence of the propriety of allowing a female at twelve, and a male at fourteen, to marry, if it deserve any argument at all, on the ground of the supposed physical capacity of producing children, cannot avail against the two other great ends of marriage:—domestic happiness, and filial education, neither of which can be expected to be well provided for, by persons of such immature ages. There is much consistency in the law of some places, which allows to parties the liberty of marrying, so soon as they are legally old enough to enter into any other contracts. The husband's acquisition of property, the wife's right of dower, the legitimacy of children, and the descent of honors and lands, necessarily and justly depend upon the civil ordinance respecting marriage; especially as such rights spring from the social state. In the case of non-age, the parties having no power to make the contract, are not bound by it. The natural law does not permit the marriage to be dissolved, when once duly and completely contracted. Neither does it re-

strain the members of civil society from alienating their liberty of marriage, as to time, for the sake of the common good. Words of marriage contrary to the law, produce no obligation on either party, and are therefore mere empty sounds; or, legally, a nullity. They who have no moral liberty of action, cannot morally act. They who are incapable of making a contract, cannot be properly said to make it. In a civil state, we are not free to marry in any way, or at any time, or in any place that we chuse; however we might do so in a natural condition.

There are, in a political condition, as in a natural one, two kinds of divorce:—1. A complete dissolution of the marriage contract, enabling the parties to marry again. This is called, by the lawyers, a divorce *a vinculo matrimonii*. 2. A separation of the parties from bed and board. This is technically termed a divorce *a mensa et thoro*.

Of wills, or
testamentary
dispositions.

VIII. Absolute property in such things as are produced by the labor of the party, or such as we have with the consent of mankind a right to dispose of after our death, may be continued after life, by will (*a*), which is a prospective alienation, taking place upon the

(a) See Tayl. El. of Civ. L. 517.—Bl. Com. ii. c. 1.—Les Cinq Codes, liv. iii. 803.—Bynk. Quæst. Jur. Privat. lib. iii. c. 8.—Spav. Puff. ii. p. 65.—Genesis, c. xv. & xlviii.—Seld. de Succ. Ebr. c. 24.—Ll. of Solon, Plut. in Vit. Sol. p. 90.—Pott. Ant. book iv. c. 15.—Ll. xii. Tab.—Inst. 2. 22. 1.—Tac. de Mor. Germ. 21.—Montesq. Esp. de L. liv. xxvii. c. 1.—Vinnius in Inst. lib. ii. tit. 10.—Turnb. Hein. l.—Senec. de Benef. 4. 11.—Jo. Gottfr. a Cocc. de Testam. Princip.—Quintil. Declam. 308.—Isocr. in Æginet. p. 778.—Florus, Hist. 2. 20.—Livy, 24. 4.—Xenoph. Cyrop. 8. 7. 3.—Hom. Odys. book xvii. v. 77.

testator's death, and not before. The law of nature permits, but does not enjoin the making of a will. The legatee's acceptance is necessary to complete the effect of the legacy. The will, being only a conditional alienation, does not preclude a formal revocation or alteration of it.

As property in land is derived by us in the express character of being members of a body of men, whose consent has been necessarily given to it, we cannot transmit it to any who have not the same qualification. Aliens therefore cannot, without a positive law, acquire land by will, or derive it by alienation. But goods, being of the original acquisition of the testator, may naturally be bequeathed to aliens, by will.

IX. The succession to intestates' goods is next to be considered.—An intestate is a person who dies without a valid will. A man sometimes dies, partly testate, and partly intestate. This occurs when he leaves a valid will, applying to a part of his property; but leaves no valid will as to the other part. Of Intestacy.

Reason, *a priori*, raises a conjecture that a man will not lose the opportunity of providing for his kindred. It may then fairly be inferred, that an intestate has intended his next of kin to succeed to his property. But as mere inward intention, without accompanying outward signs, cannot be positively known to mankind, and as it may be urged, that the deceased's neglect to provide, raises the presumption of his intention not to provide, the conjecture is of too unstable a nature to be the foundation of a right. A man's obligation to maintain his children, is a personal one, and does not immediately depend upon his goods. It extends as well

to those who have no goods, as to those who have. Although it is the parent's natural duty to provide in the best manner possible, for the rational wants of his children, yet their right, being of the imperfect kind, cannot vest in them a property in the goods. But the civil law wisely guards against manifest breaches of parental duty.

Inheritance and succession are not positively enforced by natural law (a), nor do they proceed from an universal law, established by the general consent of mankind. In almost all nations, aliens cannot inherit; and different rules and limitations of succession prevail in different countries. Succession and distribution are the ordinances of civil law; but in their natural operation, here to be considered, they have regard:—

1. To children. A parent who has been the instrument of bringing them into the world, is bound to render their condition as comfortable in the world as he can.

2. To wives, who, as we are bound to cherish them during our lives, have a just claim to consideration and regard, in the event of our deaths.

3. To grandchildren and great-grandchildren. None can more properly represent children, than their natural descendants. And the grandfather or great-grandfather is the remote instrument of their existence.

4. To brothers and sisters. Next to them whom we have introduced into this earthly scene, and to her who has been the tender instrument of that introduction, are to be considered those whom we are indebted

(a) See Locke on Gov. book i. sec. 101, 102.

ed to for the benefit of education. But, in the usual course of things, children survive their parents and acquire their property from them. The natural law, therefore, does not strictly enforce a general reversion to parents, especially in cases of ancient inheritance of land. But the presumption of the decease of parents, and the descent from them, does not exonerate children from that duty of filial gratitude, which is in this instance best shown by providing for our parents' children—our brothers and sisters.

5. To parents, grand-parents, and so on, always preferring the nearest connexion in the direct line.

6. To uncles and aunts. The natural course of things just stated as to parents, will, *a fortiori*, apply to grandfathers and grandmothers; and the same inducement of gratitude just explained, which will lead us to cherish our brothers and sisters, will, to a less extent, prescribe the provision for the descendants of our parents' parents (a).

7. To other relatives, who are rationally supposed, as having been connected by ties of blood, to have been dearer to the deceased than the objects of friendship.

But the civil laws, which prescribe upon what conditions we shall hold our property, and which must have local interests and circumstances in view, may very properly alter the order above laid down, for good political reasons. For, as I have stated, the right is not naturally absolute.

The exceptions to filial succession are:—

1. The act of disherison by a parent, which, if the

(a) See Numbers, xxvii. 8, 9.

child have not manifestly deserved it, is a cruel act; but it is not void, the parent having a discretionary right to dispose of his property. In gross cases, however, the civil law may interpose, for the sake of justice and public policy.

2. Where evidence of legitimacy is wanting. Marriage raises the reasonable supposition of identity of descent from the mother's husband. The civil law, unless where it allows the act of adoption, extends the right of inheritance only to such children as are born in strict accordance with such law.

Persons succeeding to the property of a deceased individual, are bound to pay his debts, so far as the assets extend, unless exempted by the law; for a man cannot be said to be worth more than what he possesses, after payment of his debts.

Next of kin have a right to goods only upon such terms, and subject to such limitations, as their ancestors leave them liable to.

Prescription is necessarily binding against persons unborn. For if the ancestor, through neglect, have lost his property, how can his posterity acquire it? They are thereby deprived of no right; for the accidental circumstance of descent cannot entitle them to claim, through their ancestors, that which their ancestors, at the time of their death, did not possess.

Of civil minority.

X. Civil laws should follow nature in assigning, for the period of age at which majority shall commence; the time of life when the members of the particular community generally acquire the full faculty of discrimination.

XI. During the minority of infants, the insanity of madmen, and the lives of idiots, whom the law supposes to be incurable, the public power generally interposes to guard their reputed property, for the benefit of the right owners, and to the exclusion of all others.

Civil protection of property of infants, madmen, & idiots.

XII. Metallic money (a), which is a standard-measure of price for all saleable things, has these advantages:—

Of money and coining.

1. It is the best standard of value, as the constant medium of exchange for all commodities. By means of it, we procure whatever we want, which cannot be in cases of bartering merely. Its utility will therefore cause it, in a degree, to be current in all countries.

2. It is very compact and portable, and is capable of the minutest division, or the largest aggregation.

3. Its imperishability.

4. Its comparative scarcity.

Coining, for obvious reasons, should be entrusted only to the sovereign power; and public faith should be studiously observed with regard to it. That article is the fittest for currency which describes the largest value in the least compass—is least liable to fluctuation—can be minutely divided—and is most durable.

XIII. Amongst the numerous advantages of a political condition over a natural one, is the avoidance of per-

The advantages of civil society over a state of nature.

(a) See Lieut. Gen. Craufurd's Reflect. on Cir. Med. 8vo. Lond. 1817.—Cic. de Off. lib. iii. c. 20.—Sir James Steuart's Princ. of Money applied to Bengal.—Arist. ad Nicomach. 5. 8.—Turnb. Hein. i. sec. 334 to 336.—Sen. de Benef. 5. 14.—Herodot. lib. i. sec. 94; & lib. vi. sec. 127.—Larcher's Note on ditto.—Montesq. Esp. d. L. liv. xxii. c. 1. to 15.—Purves on National Wealth, 8vo. Lond. 1817, p. 120.—Paley, ii. book vi. 11.—Harl. MSS. 251, 349, and 380.—Boizard's Treatise on Coin.—Bodinus. Republ. book i. c. 10.

petual war between men, for the enforcement of their rights. God bestows upon his creatures no advantage in vain; the power of speech is an extraordinary proof of the will of God, that we should be social beings. By means of it, we are to express to other men, our desires, our feelings, and our sense of right and wrong, so far as it is wise to do so. If it were necessary to enforce the duty of sociality, by the examples of social instinct, furnished by the inferior animals, it would be easy to quote instances of quadrupeds, who are the next to us in intelligence; of birds, who are still lower; and even of insignificant insects; all of which flock together in companies of their own species. But our eminently superior faculties demonstrate the much higher moral necessity for our associating together, and promoting, to the extremity of our power, the end of political companionship: I mean, of course, the public good. The comparatively-mighty powers of contemplation, and action, which man—this wonderful creature, possesses, are wholly unsuited to contracted and selfish considerations.

CHAPTER III.

OF THE CIVIL POWER.

§ I. THE entire civil power is, in the first instance, vested in the whole society. By the act of political association, men subject themselves to the public authority of the state^(a). The civil concord cannot be carried into complete effect, without full power of compulsion.

Definition, nature, and origin of it.

Civil power is either— Legislative; that of ascertaining and establishing, by joint determination, the rights and obligations of the several members of the state:— Or, Executive; that of acting conjointly, for their common security.

Legislative and executive power may be united in one body; or, as is oftener and more beneficially the case, may be confided to distinct bodies or individuals. This originally depends upon the will of the people.

^(a) See Vatt. book i. c. 1, sec. 1.—Arist. Pol. i. 2.—Turnb. Hein. ii. sec. 148.—Della Forza nelle case politiche, by M. Angeloni.—Locke on Gov. book ii. c. 1.

The nomothetical authority is sometimes vested in:—

1. The whole people—
2. A selection from them—
3. The king absolutely—
4. The king, with the assent of the people or nobility, or both of them.

The ends for which political society was established, explain the necessity and the origin of civil authority.

In the early times of civilisation and government, the necessity for the division of the powers of government into its distinct branches, was not perceived; and in the first legislators, as we have reason to believe, were combined the legislative and executive branches of authority.

Government should be founded upon love, not upon fear. The civil power is admirable in proportion to the general happiness which it consults, and the means which it possesses and takes for its own preservation.

Union the
bond of power.

H. The physical union, and the intellectual concurrence of the people, in the plans of the state, is the great bond of the public power.

Of legislative
power.

III. The legislative authority (*a*) originates in the power surrendered by every one in the society, to make

(*a*) See Warburt. Alliance, book ii. c. 3.—Tayl. Civ. L. p. 70.—Prynne's Plea for Lords.—Prynne's Surv. of Parl. Writs.—Montesq. Esp. d. L. liv. xi. c. 6.—Co. 4 Inst. p. 3.—Locke of Parl.—Mod. Un. Hist. xxlii. 307, & xxliii. 18.—Glanv. lib. ix. c. 10.—Com. Dig. *Parliament*.—Adolph. Pol. State of

laws. It has a right to make, alter, and repeal laws, and to affix those penalties to their infraction, which are necessary in order to enforce their observance. It also ordains to whom the appointment of public officers shall be confided, and has an absolute right of directing and controlling the executive branch of power. It may limit the succession to the sovereignty, or exclude from it particular claimants. It cannot alienate its power, and is bound to dispense its rules with equity and prudence. It is at liberty to restrain the exercise of the natural rights of the people, for the purpose of the general good, but for no other object whatsoever.

The legislature should not decide on guilt:—

1. As the guilty denies it; and,
2. As it is doubtful whether it will properly apply the punishment.

Legislative power, when distinct from executive, should be frequently assembled; but not without intermission. Its election should take place at occasional periods, with moderate intervals. The sovereign power has usually the right to convene, prorogue, and dissolve it. The legislature is entitled to enquire into and punish for the wrongful exercise of executive power.

He is the most skilful legislator who restrains the evil, and cherishes the good, dispositions of mankind. In a civil state, the authority of the legislature is the

Brit. Emp. vol. i. p. 187 to 298.—Lamb. Arch.—Lambard.—Tac. de Mor. Germ. c. 11.—Whitelocke of Parl.—Jac. L. Dict. tit. *Parliament*.—Ulpian. Fragn. 1, 3.—Turnb. Hein. ii. sec. 139.—Locke on Gov. book ii. sec. 212 to 217.—Burlamaq. ii. p. 65.—Bl. Com. i. c. 2.

test of civil justice. The people then owe it to their own happiness and preservation, to impose upon the legislative body such constitutional checks, as are necessary to guard against its undue exercise of power.

Of taxation.

IV. By virtue of the general right of the legislature to direct the subjects to do such acts as the common good renders necessary, it embraces a power to tax the subjects, according to its discretionary views, but justly.

Taxes are such contributions to the public revenue, as a man pays, and is supposed to be ready to pay, out of his property, to secure the other part of it, and his personal rights. This explains why a man in very good circumstances, or in times of danger, should be more heavily taxed, than if he were in a low condition, or if the society were not exposed to the costs of a war. No taxes but what the public good requires should be levied. As little as possible should be taken from each subject. Taxes should be demanded from every man, so far as it is practicable, according to the ratio of his means, and the consequent protection of those means by the public power; and should be levied as nearly as can be to the time when wanted. They should be disposed of consistently with the obligations due to the several members of the state. Causeless taxes, and taking a man's whole property, or a part of it, without taxing others in the same proportion, are unjust impositions; for that which is used for all, should be proportionably contributed by all.

Those taxes are the most expedient, which are paid immediately by the subject to the government, for it

cannot escape the attention of financiers, that taxes upon commodities of life have the tendency, in case of their repeal, to perpetuate high prices, without advantaging the state.

V. The executive power is necessarily established to render the law effectual—to secure public rights—to prevent wrong—to enforce reparation—and to inflict punishment. It should therefore be irresistible in the exercise of its functions. It is either internal or external.

Of executive power.

Internal executive, or judicial power, is that which enforces the legislative directions of the state, according to their prescribed letter, either civilly, for the recovery of private remedies, or criminally, for the infliction of punishment for crimes. It is the duty of judicial authority to apply the force of the society, in exact accordance with the law of the land.

External executive, or military power, is that which guards against external injuries, by defence, by insisting upon reparation, or by inflicting punishment. A discretion is generally allowed to this authority, in addition to waging war against the immediate enemy, to apply to other states for assistance, if necessary; to guard against the interference of foreigners; to send flags of truce; to propose terms of accommodation; to suspend hostilities; to make temporary peace; and to agree to terms of capitulation. The latter powers are rather legislative than executive; although, from the necessity of the case, they are vested in the military commander. But sometimes national deputies accompany armies, and dictate when they shall act on the offensive. Their power, however, cannot extend to

stop a battle begun; for if so, military command would be paralysed, unless the enemy agree to the demands made; and then it is the duty of the general-in-chief to put an end to bloodshed.

The external or military power being employed to guard against attacks from without, ought not, for obvious reasons, to act discretionarily within. But the internal executive power may call for the assistance of the soldiery, as members of the state, to enforce the laws, if its own civil forces be insufficient for the purpose. They then become an instrument in the hands of the civil power, and are bound to act under its entire control, and consistently with the laws of the country.

Valuable as are the blessings of peace, military power ought not to be despised (a). Its legitimate objects are only the acquisition and protection of right. It is, when well regulated, alarming only to the oppressor.

Both internal and external executive power are dependent upon the control of the legislature; and it is highly important to the happiness of nations, that their legislative and executive branches should be kept distinct from each other, as their nature plainly designs them to be.

In a monarchy, the executive power should be reposed in the king. It is inconvenient to vest it in a council.

The two great arts of government are to produce happiness, and to remove temptation and error.

Of sovereign
power.

VI. Sovereign power is such an independent power of ruling over a state, as cannot be invalidated by any

(a) See contra: Dr. Swift.

other human authority. It represents the majesty and interests of the nation. In the free condition of nature, every man is a sovereign, as respects his own actions. And when men leave such condition, and congregate in a body, that body is necessarily sovereign also, no external society having a right to direct its actions. A body which is subject to external political control, is not a separate civil society, but is, at the most, only a branch or province of the state which has a right to direct it.

Supreme power is that state of particular superiority over all subordinate powers, which has no superior to it. It is supreme, only with reference to the inferior authorities. Thus a judge may be supreme. The terms 'sovereign,' and 'supreme,' are therefore not synonymous.

The eminent domain, or right of controlling and disposing of private property, without injury to particular subjects, is possessed by the sovereign power, and may be exercised everywhere within the state. It may regulate the possession, and control the enjoyment, of things before existing in common. But causeless or corrupt limitations of these, and all other previous rights, are abuses of power. Regulations of police are also a necessary part of the sovereign power.

The sovereign power is invested with the rights, and subject to the obligations of the nation. The powers and duties of sovereigns are hereafter particularly stated (a).

VII. There are certain general rights, which are so

Of the general rights of sovereignty.

(a) See c. viii.

necessary to the firm and effective administration of government, that they are vested in nearly all sovereigns. They are the following:—

1. To a share in the making of laws; so that, without the consent of the sovereign power, no old law can be altered, or repealed, nor any new law enacted.

2. To absolute perfection of character and judgment; for, as the civil head represents the collective body, he cannot, politically speaking, err.

3. To absolute perpetuity; for the public head, as the reflective mirror of the people, can never die.

4. To independence, and pre-eminence over all the subjects; for no one can be superior to the representative of the whole.

5. To irresistibility, and inviolability; for, to resist the duly-constituted power, is to contend against the whole nation.

6. To national ubiquity; for the people must be everywhere in the country which it occupies.

Of prerogative.

VIII. Prerogative is a pre-eminent right of executive discretion, vested in the sovereign power, for the benefit of the people.

The powers of prerogative are generally:—

1. Declaring war and peace.

2. Signing treaties.

3. Ordering and performing all necessary acts of hostility, granting letters of marque and reprisal, raising the troops, commanding the army and navy, and ordering the destination of armies and fleets.

4. Appointing law-courts, and civil and judicial officers, deputing ambassadors, and appointing consuls.

5. Assembling, proroguing, and dissolving parliament.

6. Presiding over the established church.

7. Issuing proclamations.

8. Granting passports, and letters of safe conduct.

9. Receiving taxes, and expending them in the purposes of the state.

10. Conferring titles, franchises, immunities, and honors; and establishing colleges, and royal societies.

11. Granting pensions.

12. Granting particular powers to societies called 'corporations,' for useful purposes.

13. Granting patents for useful inventions, and literary works.

14. Coining, and calling in money; and regulating the currency in general.

15. Building embattled castles, forts, or fortifications, and erecting encampments on the lands of subjects; appointing public ports, and havens; erecting light-houses, sea-marks, and beacons; and establishing public fairs, markets, and cities.

16. Having the superintendence of gaols.

17. Regulating weights and measures.

18. Prohibiting, or permitting, importation and exportation of arms and commodities.

19. Primary satisfaction of debts, by subjects; for individuals ought not to possess rights prejudicial to the common body.

20. Presiding in the courts of justice, and executing the judgment of the law.

21. Having the guardianship of infants, idiots, and lunatics.

22. Forbidding the exit, and commanding the return, of subjects.

23. Granting pardons.

24. Possessing criminal forfeitures, and having a right to lands and goods without an owner.

Royal prerogative should be so constituted and exercised, as to serve the country, and to do public justice.

Of religious
establish-
ments.

IX. Religion must, to a certain extent, be identified with public law^(a); for all law is founded upon the will of God. Religion is besides so liable to be made the pretext for internal disturbance, that sovereigns have an essential right to govern its exercise, so far as the political safety of the state requires, and so as not to force the understanding. The laws have in view the rendering men good citizens, and nothing can better complete the design, than the preservation of pure religion. The law may restrain all professedly religious exercises contrary to justice or good manners. It should consider rather the political tendency and consequences of religious opinions, than their truth or falsehood; for it is not the business of a civil state to set itself up as an infallible ecclesiastical judge, nor is it consistent with its obligations to impose a religion by force upon the subjects.

Religious establishments are to be vindicated only upon the ground of religious usefulness. The exact limits to be preserved by the public power, in its religious interferences, may be a subject of controversy; but it is quite clear that, to a certain extent, the civil control is not only justifiable, but actually necessary.

(a) See contra:—Spav. Puff. i. p. 11, note; and see Spav. Puff. i. p. 167 to 176.—Montesq. Esp. d. L. liv. xxiv.—Sueton. August. c. 31.

First, The good government of the state requires, that the unlimited permission of fanaticism should not render it liable to sudden, or gradual overthrow.

Secondly, the very liberty of religious worship renders it necessary that the civil power should check the irregularities and effervescences of pretended piety. Thus, if quiet people be assembled to worship God, in a church, are their devotions to be interrupted by the boisterous vociferations of ranters, or jumpers, practising their religion just outside the place of worship? Or, if a congregation be met together for purposes of piety, and, according to custom, with their hats off, considering it a form of reverence due to God, to have their heads uncovered, are other sectarians to be permitted to remain there covered, under the pretence that it is more acceptable to God? Or, whilst a congregation is silently attending to the precepts of their religious pastor, is the religious service to be interrupted, by the loud and unwelcome ejaculations of some deluded zealot? Or, are persons, in a city, to be permitted to walk about, in a nude state, under the excuse, that it is pious to follow the primitive simplicity of nature? Or, are men to be allowed to marry several wives, upon the ground that they consider it to be religious to imitate the patriarchal institutions? Or, is an individual to be free to crucify himself, in profane imitation of Christ, because his erratic mind considers suicide as an act of extreme religious devotion, which will be approved of by God? Or, is a mother, in a civilised land, to be permitted to murder her child, merely because she considers its destruction as sure to procure for it a state of future happiness? Several of these indecent excesses and immoral acts really have

been committed, in the name of religion. I forbear to mention a greater number: the above are sufficient to show, that it is highly unsafe to trust, unlimitedly, to the discretion of individuals, or to exclude the civil power from exercising some control even over the religious exercises of the subjects. It is easy so to institute and administer the civil power, that it shall not interfere with the liberty which ought to be allowed to every man to adopt his own form of worship, so far as is consistent with the safety of the state, and the religious freedom of other sects.

Sovereigns, should by all reasonable and charitable means, oppose the progress of gross unbelief, in religious affairs, but avoiding, as much as possible, controversial advocacy. No social institution should violate the inalienable freedom of conscience, or invade, if it can be helped, the domestic comforts of the subjects. Acts, not thoughts, are the subject of human punishment. The faith of the majority of the nation should be the established one, if any. Christianity is the principal guide of the law of christian nations.

A bad religion is better than no religion at all^(a). There is no religion which strikes less terror into the hearts of the wicked, than atheism.

of public property.

X. Public property is that which remains in the hands of the sovereign power, not having been specifically apportioned to the people.

The national property and revenues are at the disposal of the sovereign, who is the trustee of them for the public.

(a) See contra:—Bayle. Pensées sur la Comète.

XI. How far the several branches of the state shall have a discretionary power of government—what rules shall be established, to which the public heads themselves shall submit—and what extent of authority they shall enjoy, must depend upon the people, who are the fountain of all civil power. But when those regulations are once established, they cannot afterwards revoke or alter them, without the consent of the other branches of the state.

Of the limitation and determination of the civil power.

So long as the civil compact subsists, that is, so long as each party performs its share of it, the civil power must exist, and is not liable to arbitrary alteration, according to the views of any particular party to it. But the dissolution of that branch which breaks its portion of the national contract, takes place immediately, if either of the other parties choose to avail themselves of the breach. When a society is dissolved, the government is so too, and its members return to a state of nature.

CHAPTER IV.

OF CIVIL LAWS.

Definitions of
civil jurispru-
dence.

§ I. JURISPRUDENCE, in its limited civil sense, may here be defined to be the science of making and explaining laws, for just purposes.

Definitions of
public and ci-
vil law.

II. Public law is, in its largest sense, the common understanding directed to the common good.

A civil law is a rule of action prescribed, for the benefit of a community, by the legislative power. That power must be supreme; for to make laws, is the highest exercise of control over others.

The term 'civil law,' is sometimes used to denote the ancient imperial law of Rome. The difference of senses of which the term is capable, should be carefully observed in our jurisprudential inquiries, lest we should mistake the one kind of law for the other. The expression, 'political law,' would have been well substituted, to describe the laws now under consideration, were it not that such expression applies as well to international law, which is distinct from civil laws.

III. A civil law differs from a private compact, inasmuch as the obligation of the one arises from a remote or indirect consent, and the other from an express and immediate agreement. By the act of civil union, we have undertaken to abide by whatever positive rules the common sense of the public body may lay down for our government. It would be well for our country, if our political conduct were always regulated by this comprehensive consideration.

Distinction between civil laws and private compacts.

IV. The supreme law of society is to preserve the happiness of the members; for, without its observance, society cannot exist. That happiness is admirably consulted by the fundamental principle, which must ever be remembered, in the simplest, and in the most abstruse branches of political jurisprudence, that no civil law, which is contrary to the will of God, as expressed either by his works, or by his revelation, is morally operative.

The general happiness the supreme law of society.

V. The laws of social union have two kinds of obligation—internal and external.

On social laws in general.

Their internal obligation consists in their being binding upon our consciences; duties produced by our own consent being obligations of natural law. No law, politically speaking, is binding upon the people, which is not, in some way or other, to be traced to their own consent. The legislative will, however, must be made known or promulgated, before it is obligatory; for the mere volition of the legislature, without declaration, is, in fact, so far as others are concerned, to be considered as no will at all.

Their external obligation consists in the apprehen-

sion of that force, which the collective body may make use of, to prevent the violation of the laws established amongst them. This kind of obligation is confirmed by the legislative application of force to general or to particular cases. The duration of the laws depends upon the will of the legislature. Their object is to direct the liberty of the subjects, in a reasonable manner, and not to destroy it. It is necessary that they should define what are civil crimes, and what punishments shall follow their commission. These express declarations will have the greatest influence in restraining the evil dispositions of wickedly-disposed men, and therefore in protecting the members of the state from wrong and violence.

The nature of the law then rests with the government, upon the pleasure or discretion of which, its entire abrogation, its partial alteration, its occasional modification, or its constant administration, depend.

Of the proper
nature of public
laws.

VI. Social laws should be as condensed as their intelligibility will permit. They should also be of a stable character, solemnly promulgated, administered uprightly, and directed to the public preservation and good.

That is a fortunate country, in which they are certain in expression, just in command, convenient in execution, and conformable to reason and circumstances, and in which, above all things, they are calculated to render the people happy. It is essential to the liberty of the subjects, that they should always be prospective in their operation.

They should also be conformable to the nature of the government:—

In a despotism, keeping down the powers of subordinate authorities—

In a monarchy, preserving the dignity of the sovereign—

In an aristocracy, guarding the rights of the nobles—

In a republic, promoting the equality and frugality of the people.

They should not be too numerous; for, under a system of over-legislation, they lose their force and authority. It is a sound objection to a law, that it does not attain its end.

VII. Civil laws are oftener enforced by punishment than by reward. We cannot, in a state, reward men excepting at the expence of others. The legislature expects that most men will conform to its rules. If all were to be rewarded for good, all would be involved in the awarding of the recompense. The obedience of the laws generally carries with it its reward. If all good actions were to be civilly rewarded, there would be no treasury sufficient to supply the public demand. Love of country, shame, and fear, are generally, in a civil state, the inducements to men not to commit crime (a).

Civil laws generally enforced by penalties.

It is not essential to a civil law that it should contain penal sanctions; for laws often forbid men from deriving any benefit from particular acts, without affixing any penalty, by way of punishment, to the doing of them.

(a) See Instr. de L'Imper. de Rus. 12mo. Petersb. 1769, p. 33.

As the intended legal effects are frequently produced without penal visitations, so the laws which do not inflict punishment in those cases, merely render the acts void, or of no effect in themselves. No punishment is awarded, because the evil disposition of the party does not appear. Of this kind is a law in England, which forbids the devise of a freehold estate, by testamentary instrument, executed in the presence of less than three witnesses.

Of the restrictions of civil laws.

VIII. The civil law punishes for no offence which it has not previously forbidden. There are infractions of natural right, which the social ordinances, either from inadvertence do not punish, or which, from circumstances, they cannot reach. Those acts, however, although civilly permitted, are not to be regarded as naturally just, for civil jurisdiction cannot alter the law of nature. It only restrains us from exercising our natural rights of defence, reparation, and punishment. It legitimately imposes no restrictions but those which the general interests of civil society require. Men are not discharged from the performance of natural duties, because they have joined states.

It will, I hope, be easily inferred from the foregoing explanation of the civil state, that acts which natural law would not recognise as valid, are so at civil law, on the ground of the indirect consent of the parties concerned. Of such a nature is the selling a man's goods, on non-payment of taxes. He has subjected his right of property to the civil control, and that property ceases when the law takes possession of it.

The supposed impolicy or injustice of a law is not, of itself, an excuse for its non-performance. The sub-

ject is generally bound to obey all existing laws. The legislature is the only proper reformer of them. We are justified in availing ourselves of the exertist of the laws, so as we conscientiously adhere to the design contemplated by their enactment. The letter of the law should not, contrary to its spirit, be rendered the instrument of oppression. Individuals of exalted feeling will not avail themselves of the precise prescriptions of law, in order to inflict a cruelty or a hardship upon their fellow-creatures.

IX. Some oaths; contracts, and promises, which are naturally lawful, are civilly invalid, for two reasons:—Because the members of a society are incapable of granting rights, and raising obligations, in opposition to the laws which they have obliged themselves to conform to; and because, having entered into an antecedent obligation to obey the social laws, they have not the liberty to enter into a subsequent and revocatory one. All contracts and promises offensive to good manners, are bad.

Of the civil effects on promises, contracts, and oaths.

The legislature may set aside even past contracts, which are construed by it to be contrary to the common benefit; for the parties have bound themselves to obey the laws, whenever they shall be made; and the obligation of obedience to them is antecedent to the making of the promise, contract, or oath.

If the enactment of the legal avoidance be made only for the benefit of the making party, although he is not under a strict or perfect obligation of natural law, to defeat a law made with the consent of both parties; yet he is under a sort of imperfect obligation, not selfishly to receive a benefit to the loss of another, who

has confidently trusted to his honor. The case of an infant's contract to return money, or pay the value of goods had, will exemplify this doctrine of subsequent voluntary waiver of restraint.

But if the restraint be imposed by the civil law, to prevent the maker from deriving benefit from the void act, of which he is the author, and to prevent consequent harm to others, he cannot justly perform it afterwards; for such a right would extend to the acquirement of advantages at the unlawful expence of others.

It is clear that a man may surrender his own rights or property if he choose. It is equally plain, that he has no moral freedom to encroach, at his discretion, upon the possessions of others. And on such occasions as these, we should rather consider what the law of nature, applied to a state of society, enforces upon us, than what, in its own original simplicity, it would teach us.

A king who has absolute legislative power, is bound by such legislative promises, contracts, and oaths, as are naturally valid, but would be void as to his subjects; for they limit the operation of the laws which he has previously made. His will to abrogate the former law, so far as respects himself, sufficiently appears from his engagement. There is, therefore, no law restraining him. But the case is different, if he be bound to observe laws previously defined, and of which his high office does not render him independent. All contrary undertakings are then void. And in matters not of a legislative character, being one of those to whom the reason and subject of the particular law relate, he is bound by its injunction. He has taken away

his own power, unless he has specially exempted himself from the operation of the ordinance.

An absolute king is not at liberty to release himself from his engagements, by subsequent acts; and the principle of restraint, which governs the undertakings of his subjects, does not control his; for it would be sophistry to argue that he could, after he had bound himself by an undertaking, forbid himself from performing it, and therefore that he would not have a moral liberty of performance.

Even a despotic king, however, cannot engage himself to the performance of that which clearly defeats the very end of society; for he has entered into a compact to govern the general body, for the common good.

X. Civil laws are of two kinds:—written and unwritten. They are often confounded, from an inattention to their proper definitions.

Civil laws are written & unwritten.

XI. Written laws are such as the legislature has promulgated in express words.

Of written laws.

The original existence of legislative codes, may, after the invention of signs or letters, be ascribed:—

1. To the real or feigned ignorance of the people as to the popular laws. 2. To the mal-administration of them by the executive power. Such written collections of laws were, anciently, sometimes founded upon custom, or implied consent—sometimes upon deliberative and express agreement—and sometimes upon the arbitrary will of the chief, or monarch.

XII. Unwritten laws are those which usage, or the

Of unwritten laws.

common consent of the society, has established. Their prescriptive obligation is inferred from their long and immemorial existence, without interruption by the legislative power. For those rules of conduct which have been long known to the public, and quietly permitted by them, are binding upon the political body. It cannot be presumed that their observance has been forced upon the political members, without their consent, whilst it was always in their power to declare them void.

Laws of usage or custom, I mean such as are not in express and so many words laid down in writing for the observance of the civil body, by the legislative power, are not written laws. They may have been very learnedly treated of, and industriously collected together, by jurists, in books received as credible authorities, in the civil courts; but they are not written laws. Such books are the productions of unauthorised individuals. They are not the edicts or enactments of the legislature. It is no answer to remark that they are allowed to be quoted in the courts of civil jurisdiction: for the judges almost every day explain, and alter, and modify, and dispute, and overrule some doctrine of a learned law-text writer. But written law is not liable to this control: it is all-powerful, and speaks for itself. That which is now unwritten law, may, in a remote age, have been written; but this is not to the purpose: if it be now lost, it is to us as much unwritten, as if it had never been committed to writing.

It is often difficult to ascertain unwritten law, because it will admit of doubt, whether the notions of existing judges, or the works of common-law writers, are

such as will hereafter bear the test of judicial decision. The records of courts of judicature, especially as to cases which received an arduous legal examination, are to be accepted as evidences of judicial usage.

Popular disuse, or legislative repeal, will revoke the force of customs, however long established. Customary laws, relative to particular places, persons, or things, are binding as to such objects alone.

XIII. All written laws are binding until they are repealed. To neglect the execution of positive laws, on the ground of their antiquity, obsolescence, or desuetude, is a violation of the independence of the legislature, and of the just claims of the people. If a law were, at its enactment, directed against particular injuries, which are no longer to be dreaded; or if it have had in view the punishment of acts which have been long suffered, and perhaps, in strict justice, ought to be suffered, with impunity; those are reasons which should induce the legislature to repeal it. But the executive power has no right to alter the standing determination of the legislative authority. Of desuetude.

XIV. As the numerous rays of justice concentre in the rendering to every man his due, its observance is essential to the happiness and maintenance of political societies. Of the administration of justice.

In the administration of justice, it is natural to prefer the greater good to the lesser.

The country should possess more than one principal tribunal of justice, in order that the trial of causes may not be delayed, through an accumulation of busi-

ness; and that the suitors may be enabled to exercise some choice as to the tribunal before which they bring their disputes. This power of election is a safeguard against the imperfections of judgment, and corruptions of conduct, which the fallibility of all men renders possible with judges.

The ordinary tribunals should be liable to be appealed from, to the highest court of the country, in cases of magnitude, and with salutary restrictions, so that possible error and corruption may be avoided. More than one appeal should not be permitted. In all courts, confusion, and dangerous multiplicity of precedents should be avoided, as much as possible. A very slight adherence to form is inconsistent with liberty and justice. A very rigid adoption of it is expensive, and ruinous. Persons charged with offences, particularly if they be atrocious, should not escape punishment, from technical advantages. But if a man be tried for stealing a knife, he should not then be found guilty of stealing a fork. In the purest state of society, there must be forms in the administration of justice, for it is only by the adoption of forms, that regularity of proceeding can be secured. But if the forms be of so strict a character, as to work injustice to the suitor, they betray evidence of an imperfect administration of government. No private wrong should be committed, without a remedy; nor any criminal act without a punishment. Monopolies should be discouraged, unless when tending to the public utility. A fiction must not be allowed to evade a principle: in other words, pretences cannot defeat rights—the law will not permit that to be done indirectly, which it does not tolerate directly. The recovery of claims, and de-

manding of punishments, should be attended with as little expence as is practicable. Laws are not binding until promulgated; but after promulgation, ignorance of them does not justify their infringement. The laws of a country should be known, and pre-ordained: men should know when they are politically innocent, or guilty.

Delay, and a perverse spirit of obstinate litigation should be discouraged. He who gives up a demand, cannot revive it.

Guilt is civilly removed either by punishment, acquittal, death, lapse of time, or pardon.

In criminal cases, men should be judged, not according to the consequences, but according to the reasons of their acting (a).

XV. The publicity of courts of justice is a highly-essential branch of general jurisprudence; for upon it depend the safety and freedom of nationalists. Secret accusations are unjust: pure liberty cannot exist in a nation in which the courts of law are closed, or in which the publication of judicial proceedings is restrained.

The publicity
of courts of
justice.

I shall here condense, from the only treatise (b) ever published upon this subject—Firstly, a statement of the principal reasons for which courts and their proceedings cannot, consistently with their character and end, be kept private:—secondly, a recapitulation of the chief benefits arising from the publicity of courts, and the publication of their proceedings:—and third-

(a) See Bynk. Quæst. Jur. Publ. de Reb. Var. Arg. c. 2.

(b) See J. P. Thomas's Argument against the alleged judicial Right of restraining the Publication of Reports of judicial proceedings. pp. 148.—1822.

ly, I shall endeavour to answer the objections raised against the system of publicity.

And firstly—Of the reasons why all courts, if their nature and end be observed, must be left to the use of the public:—The object of all courts is essentially a public one: the remedying of popular grievances, for the benefit of the state, according to the laws. The judges and judicial ministers are honorable public servants, remunerated out of the common revenue. A court, then, is not private, but public property: the public interest is inseparable from the existence of a court. All public good, therefore, should be done, of which the court is capable; and the non-publication of law-reports is inconsistent with its public nature and design. Every member of the state having an equal interest in the administration of its laws, has, *a priori*, a right to be present at such administration. Every such member is a party to all law-enactments, his implied consent being necessary to their taking effect. Every subject is interested in the judicial decisions, which it will become his duty to observe. To keep courts private, is to deprive the subject of the means of knowing what the laws are; and to punish him for their infraction, whilst laboring under such ignorance, is causeless harm. If courts be closed from the public, great injustice and oppression may be exercised by the judges with impunity, the strictest check upon their possible ignorance and partiality always being the publicity of their proceedings. Justice and political safety are, in the minds of men in general, wholly irreconcilable with close courts. The laws are made, not to awe men, but to protect them. Suitors and criminals cannot believe their just interests to be perfectly secure, if the tribunals before which they are tried, be closed.

Pure and extended justice cannot, in fact, from human fallibility, be always rendered to those who lose the benefit of the public attendance. To close courts, is thus inconsistent with their design of rendering impartial justice. To deprive men concerned in judicial proceedings, of the means of self-protection, by the widest discovery and exposition of the truth, is incompatible with social security—the end of civil law. No professed custom of closing courts can be valid, as it is plainly unreasonable, and contrary to the very end for which they are established. The people never can be assumed to permit its own obstruction from its own courts. A permission, in a case of such importance, should be express, and not implied. Judges, therefore, have no right to restrain the publicity of courts, unless the legislature, in express terms, command, or permit them to do so.

Secondly.—The immense protection which such publicity affords to suitors and criminals, by guarding against the falsehood of perjured men, cannot be too highly estimated.

The knowledge of the law should be diffused as widely as possible, to authorise the infliction of punishment. But this diffusion is very greatly retarded by courts which are kept close, or the proceedings of which are prohibited from being published for a time, or indefinitely. That which does not attain its end, is imperfect: laws which are made to prevent, rather than to punish, lose their intended objects, if administered in close courts. Popular confidence in the justice and administration of the laws, is inconsistent with their private administration. The accurate acquisition of jurisprudential knowledge is, in a great measure, secured by the public discussion of controverted

points. Initiation in the practice of the law cannot be fully attained, without open courts. The legal decisions in the superior courts are generally the law in all the other courts throughout the nation; and in such cases, the reports of the higher tribunals should be allowed to be instantly circulated throughout the country. The knowledge which those, who may be immediately or contingently interested in the very matters of enquiry before the courts, might have the opportunity of acquiring, relative to affairs in which they are personally concerned, is lost to those who are subjected to a system of privacy.

Thirdly—I shall proceed to answer the objections raised against the unrestrained publicity of courts:

1. That judges ought to have the power, if they choose, to close the courts; as they are the persons best qualified to decide upon the question—

Judges ought never to have the power of suspending the national laws. And they are, for obvious reasons, the persons least qualified to determine upon the subject.

2. That the reports of many cases of judicial inquiry, are unfit for the public eye—

It is always in the power of the law to punish for such publications, as are of a grossly-indecent character, and contrary to good morals. But judicial cases of such a kind are, in comparison with others, extremely few. When they occur, it is easy to divest them of their objectionable tendency. And this objection, at the most, can apply only to proceedings of an indelicate description.

3. That the ends of justice, in some cases, require non-publicity—

I cannot conceive any such cases, unless before an

ordeal or *ex parte* court, similar to that of an english grand jury, the members of which are sworn to secrecy. Truth forwards justice, and does not impede it.

4. That the people cannot all be present; and therefore may be entirely excluded—

Circumstance ought not unnecessarily to prevail against a popular right. Because all the people of a country cannot, from physical causes, be present at judicial proceedings, is no reason why they should not be informed of them by means of publications. Those who are absent from the courts have as much right to know the matters transacted in them, as those who may be, either by favorable opportunity, or the permissive will of the judges, admitted into them.

5. That the positive laws are established; and that the public is shut out against judicial interpretation—

The interpretation of the laws concerns the subjects, as much as their very letter; and they have therefore as much right to know the judicial decisions, as the literally-enacted laws. The courts are continually settling new principles of law, and explaining and determining doubts, to which the multifarious events of mankind, the ambiguities of legal ordinances, and the subtleties of lawyers give rise; and as such determinations are compulsory upon all the members of the state, they should have the complete means of being acquainted with them.

6. That, in a free country, the fear of popular indignation will prevent judges from committing injustice—

A country cannot well be free in which the courts are closed, or the judicial proceedings concealed from the public eye. And if the greatest check upon the

natural fallibility of judges be removed—the publicity of their acts, we can easily conceive their liability to error to be increased in an extreme degree.

7. That incorrect accounts of judicial proceedings are allowed, by the public system, to reach the popular ear—

It has long been settled, that the abuse of a thing does not impeach the use of it. The more public the proceedings are rendered, the more correct, upon the whole, will be the general notion of them. The evil complained of, will exist to a large extent, if the verbal and garbled accounts of a few interested, ignorant, or unthinking individuals, only be permitted: but if the courts be open to all the world, the reporters will, for their own sakes, furnish correct and valuable statements of the proceedings, for the public use.

Rules of descent as to freehold estates.

XVI. The law of succession regulates the representative acquisition of personal property, upon the death of intestates. This law, although generally founded upon rational, and therefore upon natural principles, is regulated by the enactments of the civil law. I have, in the second chapter of this book, detailed the usual regulations of intestacy, as to personal property. The following are the fundamental rules with regard to real estates, now established in most places:—

1. The descent proceeds in a downward perpendicular line; and not according to nearness of relationship.

2. Ascendants beyond the original ancestor, are therefore generally excluded.

3. Collaterals, as brothers and sisters, take next to descendants.

4. The heir of the heir is the heir of the ancestor, *in infinitum*.

5. None but legitimate children acquire by descent.

6. The children first take.

7. The males before the females.

8. The eldest son before the younger ones.

9. The daughters all take equally.

10. The brothers next to the children.

11. The eldest male, amongst those of equal degree, is preferred.

12. The succession of the possessor is the same as that of the predecessor.

13. A person cannot take, as descendant of one who could not take.

14. It is not necessary that a person should be in actual possession, in order to enable his descendants to take.

15. If issue of the last descendant fail, then his nearest line is to be taken, and so on until an heir be found.

16. A *fœtus*, from the first instant of developement, has a latent right of descent to the inheritable property of its deceased ancestor.

17. On failure of inheritable blood, the lands revert, or, to use the technical term, escheat, to the lord paramount of the soil.

XVII. The institution of primogeniture is not so much opposed to the laws of nature, as is generally imagined. It is intended to be directed to the good, not to the evil, of the younger branches of families. It refers only to lands, which are granted expressly

Of primogeniture.

subject to this appointment. In most cases the parent has the power of distributing the lands equally, if he so choose.

In those countries in which the order of descending nobility exists, the distinction of primogeniture is peculiarly necessary, to support the dignity of the hereditary nobles.

Primogeniture has been described by some, as a highly impolitic institution. But it should be recollected, that the distribution of land into minute and geometrically-increasing divisions, produces great national inconveniences. A freeholder acquires twenty-five acres of land: he dies possessed of them, and intestate, leaving five children. Each of his offspring, under a system of equal division, becomes entitled to five acres; one of them afterwards dies intestate, leaving five children; each of whom, therefore, acquires an acre; and that acre, in the succeeding generation, is dwindled down to the apportionment of less than a rood to each descendant; in the sixth generation, supposing each intermediate descendant to have five children, the quantity of land devolving, in the case of continued intestacy, would be eight feet four inches square: an area not sufficient even to build a house upon. This ought not to be received as an extreme illustration of the principle; for, judging from the usual course of human events, the plausible motive of a law of equal division, if such were in existence, would frequently induce men to leave their property to its operation. The reader may judge better than I can describe, how severe, how various, and how numerous, would be the evils of such a system. A minute division of real property has the highly injurious effect of stripping the lands of timber.

I am bound however to acknowledge, that the system of primogeniture is often abused to very unjust and unkind purposes; and that frequently, instead of being applied to its legitimate objects—the benefit and respectability of families, it tends to their downfall and disgrace.

XVIII. The great work of ascertaining truth, is a task which may well engage the closest attention of enlightened men. Judicial investigation of facts is a branch of political duty, in the highest degree connected with the welfare of society. The consummatory administration of the laws cannot be effected without an adequate knowledge of circumstances. Often does it require the utmost skill of the social philosopher, to detect the artful chicane of the false witness, and to estimate, with accurate minuteness, the relative value of contradictory evidence. A case at law cannot be rightly decided, without viewing the whole train of separate or coincident matters connected with it. Truly, indeed, may it be said, that this discovery of legal truth is intimately associated with the highest departments of general science. Positively, indeed, may it be maintained, that all the rich sources of moral and physical philosophy are often necessary in the discriminating analysis of the judge and the jurymen. It is the duty, it is more than the duty—it is the happiness, of the good administrator of the laws, to approach, as nearly as human nature can, to the goal of perfection in his rigid and solemn enquiries. Often will he be puzzled in the arduous investigation; often will he be pained at the tedious contradiction; often will he be inclined to shrink from the combat of dia-

Of judicial evidence.

metrically-opposite evidence. But he has an office to perform, which requires the noblest fortitude, and the most exalted circumspection. It does not become the nature of his station, it does not befit the elevation of mind essential to him, to draw back from his duty.

In the discovery of truth of all kinds, there are certain rules of reasoning, which it is want of wisdom to abandon: but it is dangerous to raise boundaries of art, in order to defeat the views of nature. This is so convincingly true, that I scarcely dare to prescribe strict rules of evidence to be observed in every case. The judge will lay down a very few general principles, for the government of his mind in the analysis of controverted facts, such as, that evidence should convey a moral conviction of the fact to the mind—that presumption must not prevail against certainty—that the best testimony which the case will admit of, shall be adduced—that hear-say evidence is generally inadmissible—that no court can entirely provide against the perjury of false witnesses—that, in cases of the use of deadly weapons, three things must be proved: the deadliness of the weapon, the deadly intention, and the attempt to carry that intention into effect.

The testimony of all rational persons not interested in swearing falsely, should be received. When the several proofs, however abundant, depend upon a controverted and doubtful fact, the truth, until judicially determined, remains suspended.

To discover the plain truth, will be the grand object of the judge's all-searching mind. In the pursuit of so highly important an object, he will not fail to be

swayed by broad, and just, and liberal considerations.

Evidence is positive or circumstantial, parol or written. The force of all evidence must depend upon the comparative veracity of the witnesses examined, and upon the strength or weakness of the facts to which they depose. Direct evidence in the cases in which it can be obtained, is, when of a credible character, doubtless of much greater value than presumptive testimony: but the frequent absence of the knowledge of direct facts, the treacherousness of men, their liability to prejudice and error, and the many ingenious modes by which the truth is tortiously twisted, or fraudulently withheld, must induce us to receive circumstantial evidence with attention. There are indeed many subjects of judicial enquiry, in which it necessarily forms an important feature in the proceedings of the courts. Such are the cases of murder, when no one but the two parties is present; of right of way, which depends upon prescriptive use; of boundary of land, which is ascertainable by a number of concurrent circumstances; and of pedigree and descent, where the truth is incapable of immediate proof, excepting by a complicated, yet convincing train of facts. Thus are inferential indications received by judicial tribunals, as worthy of reliance. The weight however which attaches to them, must entirely depend upon their connexion with the questions at issue.

The arguments of those who would wholly reject presumptive testimony, are puerile. In all other departments of knowledge, the mind embraces analogical proof, and there is no reason why it should be rejected in this branch of science. It would be impos-

sible to point out, with rigid accuracy, every case in which this kind of testimony can be fairly resorted to: it is enough to say, that it is applicable to every matter in which presumption furnishes reasonable evidence of any of the facts in dispute. The gradations of belief induced by this relative or secondary description of evidence, depend upon the varying characters of particular circumstances. No exact rules can be stated for the universal government of the mind in matters of inductive synthesis.

The application of the principles of judicial evidence, to the practice of the courts of law, in different forms of action, is a very necessary branch of the knowledge of the lawyer. He who well understands those principles, and can readily apply them to the various branches of criminal and civil proceedings, cannot have a merely-superficial knowledge of jurisprudence.

Of juries.

XIX. The tribunal of a jury is replete with high advantages to the state: it forms the best mode of judicially ascertaining facts—it is the most powerful barrier against corruption and chicane.

Jurymen, from their acquaintance with the usual concerns and customs of mankind, are well qualified to form probable conclusions as to fact. It is their duty to ascertain the facts, and to distinguish falsehood from truth. In this particular, they differ from the judges of the country, whose province it is to advise juries, and to adjudicate upon the law of cases. For the purpose of preserving this essential separation, the pleadings frequently exhibit the admission of some facts, and the denial of others. At other times, the whole statement of the actor or plaintiff in the suit, is

denied by the respondent or defendant. This is the distinction between one issue and several issues. In the case of one issue, the entire matter of fact is left, in bulk, to the jury: in the case of several issues, there are distinct branches of fact to be ascertained by it. It may be doubted, whether the general issue should not be allowed to be pleaded in all cases, in order that the administration of justice might not be clogged with technical difficulties. The decomposition of law-pleading, is a work of great nicety, and frequently gives rise to embarrassing considerations in court.

It is necessary, in the investigation of evidence, First, for the judge to know and state what proof the case requires, in order to establish the allegations upon the record; and secondly, for the jury to ascertain how far such proof has been supplied. The law does not allow the jury to interfere with the functions of the judge; neither does it permit the judge to overstep the limits assigned to him, for the benefit of the public. The law in general relies upon the conscience and discretion of the jury. Its decisions are never set aside, excepting upon the grounds of gross corruption, wicked or inadvertent misrepresentation, or disobedience to the directions of the judge, on those points of law, which it is his peculiar business to decide upon.

Good subjects will not object, in their turn, to devote a few hours to those duties of a jury in other mens' causes, which they will probably themselves call for the performance of, in their own matters.

XX. Courts of equity are instituted to moderate the rigors of strict civil law, and to give to it its really-intended and just operation, by correcting, that in

Of courts of equity.

which the law, in consequence of its universality, is deficient.

The enforcement of justice and good faith is often of a nature so peculiar and uncontemplated, as not to fall strictly within the operation of municipal law, the generalising rules of which would often work injustice, if equity did not interpose its mild interference. It is the grand characteristic of equity proceedings, that every case is decided according to its particular circumstances. Courts of equity should consider rather the natures than the forms of the matters before them: it is therefore their duty to supply formal defects in cases in which justice so requires, unless the legislature have expressly or virtually prohibited such relief. The enforcement of contracts according to the intentions of the parties, forms the principal, but not the only subject of consideration in these courts. The jurisdiction of them is in some respects concurrent with, and in other respects separate from, the ordinary courts. They generally have powers of decision in matters of trust, for the furtherance of confidential justice. They usually, but not invariably, refuse relief, excepting where the complainant has no remedy at law.

Their powers are generally as extensive as their expansive nature. It would be most tedious, if it were even possible, here to enumerate the several descriptions of cases in which equity affords remedy. Courts of equity should be, in other words, courts for the enforcement of justice. Their practice should never be governed by precedent, excepting so far as is necessary for honest purposes. Their sole object should be to do what is right between man and man. It is perfectly consistent with this enlarged view, to

submit to the legislative declarations of the public will, and to the unwritten law of the country. It would be judicial injustice to abrogate the legal institutions approved by the common voice.

Costs should never be awarded to those parties whose fraud or injustice has rendered the proceedings necessary.

These courts, like those of common law, give no relief in the cases of unlawful agreements; nor do they countenance very unreasonable contracts.

Although equity-decisions are made according to the just discretion of the judge, yet they are governed by broad and established principles, rather than by vague ideas, or capricious prejudices. But as courts of this description are politically useful, only in proportion as the judges presiding in them decide according to natural reason, the justice of their decisions should not be cramped by artificial limits.

It is sometimes the province of equity-courts to protect the idiot, the lunatic, the infant, the *cestui que trust*, and the wife, from those oppressions to which their peculiar situations render them liable.

Intricacy, delays, and expense, should be avoided in the proceedings of these courts. Their remedies should be open to the poor, as well as to the rich. A tribunal of equity should decide with as much regard to truth, as that of a jury; and so far as it is fairly practicable, with as much dispatch.

Vidæ voce evidence is essential to the administration of sound and even-handed justice. Appeals should never be permitted without security for the damages or costs recovered against the appealing party. No person should be allowed to proceed hostilely against another in equity, without an affidavit being first filed,

of the truth of the complaint, to the best of his belief. Verbosity and tedious technicality should be excluded from the forms. In really friendly suits, instituted only in order to obtain decrees in doubtful cases, pretended hostility and combination should not be averred. It is, to the philosophic juriconsult, painful to find the dignity of courts of justice tarnished by unnecessary misrepresentations, or useless fictions.

Of courts of
honor.

XXI. The establishment of a court of honor, in which rude and wilful affronts, not within the cognizance of the ordinary courts, can be forcibly redressed, has, under judicious regulations, salutary effects upon the manners of a country.

In England, a court of chivalry exists, but its use is nugatory, in consequence of its not having the power to fine or imprison, for breach of its orders.

Of arbitra-
tion.

XXII. Resort to speedy, independent, and economical arbitration should be favored by the law. The written decisions of arbitrators, who have been authorised in writing, are entitled to judicial respect. Gross corruption or obvious error alone are grounds for setting them aside. If a party to whom an arbitrator has awarded a sum of money, be afterwards legally convicted of conspiracy in setting up the claim, he should be discharged from the supposed debt, notwithstanding the award. It is, in such an extreme case, to be presumed that the arbitrator was grossly deceived in the evidence before him, particularly if he grounded his decision partly upon the evidence of a conspiring party. The civil law should not fight against itself.

The law should compel the attendance of witnesses

before an arbitrator. His power is otherwise in a great measure nugatory.

It is dangerous to allow to referees discretion as to costs. The equitable rule is to subject the condemned party to the payment of all the costs occasioned by his withholding right from his adversary.

XXIII. The forms of written conveyances of property of all kinds, must, to some extent, depend upon the legal institutions of the country, relative to disposition and transfer. It is much to be regretted, that, in very civilised states, the wording of conveyances is so extremely long and tedious. The philosophic lawyer can find clear and precise modes of expression, without degenerating into extravagant verbosity. The evil of unnecessarily long instruments, consists not only in their immediate, but also in their remote consequences. For when suits are instituted with reference to the property transferred, it frequently becomes necessary to set out such instruments in the several pleadings at full length, which aggregately much increases the expense of the proceedings.

Of written conveyances.

Inordinately-long conveyances generally arise from one of three causes: complicated laws respecting property, a multitude of lawyers, or a highly refined state of society.

XXIV. It is the duty of the state to tolerate free discussion, and to allow truth to find its level. It is highly dangerous to impede the progress of rational enquiry. To do so, implies a distrust of the expediency of the institutions inquired into. That is not ever true, which is the opinion of the majority. Nor is that

Of the liberty of the press.

doctrine infallibly correct, which has received the greatest investigation. The weight of argument, not the plurality of voices, must always determine the inquiries of reason. Laws cannot be imposed upon the understanding. Persuasion is the only truly-impressive and dignified stimulus to obedience, in a government. Those only are enemies to the state, who by violence oppose it. They are not so, who merely suggest modes for better government. A man should not be fearful of expressing his thoughts, as to what is best for mankind, from a fear of affronting others.

But as popular feeling is liable to be easily inflamed by the artifices of designing demagogues, and as respect is due to national institutions, bearing not only the stamp of popular usage, but also the impress of grave deliberation, all attempts to undermine the political or religious establishments, which originate in really-seditious inclination, are repressible by the arm of the civil power. The guilt or innocence of the writer must be collected from the internal matter of the publication, and from the external circumstances under which it is published. It is unwise to clip the wings of Genius, unless her aspirations be manifestly directed to national injury. It is illiberal to restrain that real freedom of the press, which, amidst the varied efforts of its sometimes misdirected talent, consults decency of language, and respect for government in general, and wishes to do ill to none.

The subjects should be legally protected from wilfully-unjust calumny.

Blasphemy, which is the expressing one's self irreverently of the infinite Divinity of our worship, is highly punishable.

XXV. The awarding of punishment is a branch of Of public punishment. duty of the greatest importance in states. It is a subject which must be viewed with the deepest anxiety. The natural liability of man to err—our continual observation of his indiscretions and offences—and above all, the precepts of religion, teach us to extend as much humanity as is consistent with the salutary object of prevention. The legitimate objects of punishment are the security and enjoyment of human rights, and consequently the prevention of infringements upon them. The nature of the crime, and the circumstances under which it is committed, must always be well considered, in the apportionment of punishment. It is inhumane to argue for the infliction of death, upon the ground that it prevents crimes, unless they are of a nature so injurious to the interests of the state, as to require that severest prohibition. The ease of commission, in cases of importance to the community, must necessarily enter into the mind of the legislature; for, in proportion to the probability of such commission, must be the strength of the preventive guards. It is thus that most governments have considered it necessary to punish with death the stealing of cattle, which are unavoidably exposed in open pastures. If the robbery of them were not exemplarily punished, the property of the farmers would be subject to continual danger.

Extraordinary severity, however painful, must be applied in cases in which the vital interests of the state are attacked; for rigorous as the measures are, they are justifiable, if the country cannot prosperously exist without them. It would however be callous cruelty, not to acknowledge, that to deprive our fel-

low creatures of life, is a dreadful office. Perhaps, as a public punishment, it can very seldom be defended: certainly, it is never to be justified but upon clear necessity. It is highly reprehensible, in the eye of our Eternal Maker, when lightly or inhumanely exercised.

It cannot excite surprise that japanese offenders, upon discovery, frequently destroy themselves, in order to avoid the tortures decreed by their laws for even trifling offences.

It should never be forgotten by the administrators of justice, that the proportion of punishment should have relation to the quality and circumstances of the offender. A fine which presses outrageously upon one individual, may scarcely affect another. A period of imprisonment which is a severe chastisement to one person, may be a very slight infliction upon another. A privation may be to one party almost a nominal punishment, whilst, when applied to another, it is an extravagant, and even a cruel subjection to suffering. The influence of punishment is the true test in the administration of the penal laws.

So far as is consistent with the interests of mankind, the personal good of offenders should be considered.

Judges should not punish criminals for refractory conduct upon their trial. It is indeed a most painful sight to observe an offender exhibiting hardened obstinacy, instead of humble repentance. But ministers of justice should beware how they avenge a contempt of their own authority or persons. Something must be allowed for the misery or irritation of the moment. It is too much always to expect refinement from the ignorant, or calmness from the afflicted.

XXVI. The community of women, similar to the collective plan of Socrates, of which we read in the "commonwealth" of Plato, has been improperly termed 'a community of wives.' Liberal minded men will allow it to be no slight objection to the practice, that it greatly detracts from the dignity, the virtue, and the general enjoyment of the female sex. Men place but little value upon what is common to all; but much upon what is limited to themselves. We can say nothing of the modesty of women in such a state: and it is easy to conjecture how little will be the modesty of men living in a system of sexual profligacy permitted by the laws. This community is, besides, immediately opposed to the proper performance of the parental and filial duties; for how can they be performed, when it is not correctly known by whom, or to whom, they are to be observed? It also negatively diminishes, to a great extent, the peace of society. There is nothing which tends more to preserve the general harmony of the city or state, than the good will generated by the correlative relations of husband and wife, father and son, mother and daughter, grandfather and grandson, kinsman and kinsman, kinswoman and kinswoman; not to enlarge upon the incitement to personal industry, which distinguishes the system of fixed separation. Many nations have therefore, with great wisdom, lessened the civic burdens of those who have contributed a certain number of legitimate children to the state. The subject who brings up a dozen children in habits of steadiness, industry, and piety, is well entitled to a mural crown. The plan of Plato, of civic apportionment and public education, in the commencement

Of communi-
ty of women.

of 'Timæus,' in his commonwealth(*a*), is more plausible, but scarcely more virtuous, than that of Socrates. Both proposals are inconsistent not only with an age of civilisation, but even with the inferior views of a demi-barbarous time.

Duelling in a state.

XXVII. Where courts of honor do not exist, or rather, in countries in which injured honor cannot, in several flagrant cases, demand reparation, it is unjust to punish duelling as murder. Thus in England, the court of chivalry, excellent as its objects are, is, as I have before observed, impotent; and a man may, with legal impunity, in many cases call another collectively "a rogue, a thief, a rascal, a swindler, a liar, a blackguard, a knave, a scoundrel, a villain, a miscreant, and a vicious man." A subject must entertain very great submission to the laws, who will calmly endure such epithets.

In Sweden, a person who has improperly traduced another, is compelled to make a public apology, and the law against duelling is therefore very severe.

Of the lower orders of people.

XXVIII. The interests, and even the amusements of the common-people should not be neglected, whilst the security and advantage of the higher orders are consulted. They form the sinews of the state: it is upon their united labor, that the agriculture, commerce, and arts of the country, in a great degree, depend. They who have not the weapons of the rich, wherewith to defend themselves from attack, should be well shielded by the laws, from the probable grasp of the cunning

(b) Lib. v.

oppressor. They should, in some civil and criminal cases, have that facility of obtaining justice, which money procures for the rich.

The impotent part of the people, that is, those who are, from the operation of natural misfortune, unable to support themselves, should be provided for by the state; but the public provision, the fair resort to which is far from disgraceful, should be so managed, as to hold out no inducements to laziness or deception.

Much of the evil entailed upon society by the poor-laws, arises from their improper administration. In order to obtain some internal funds in workhouses, for the support of the poor:—

1. They should be employed.
2. They should be occupied somewhat agreeably to themselves, as in gardening.
3. They should be allowed a share of the profit.

Benefit societies have the admirable object in view, of relieving the poor by their own contributions, and by their own body. By these means, the laudable spirit of independence, so dear to every good man, is, in a great measure, preserved; a self-checking system of caution against imposition, is supported; and the poor-rates are much decreased, in a manner the most agreeable and advantageous to the laboring people. I am aware that they have nevertheless the tendency to raise the lower orders in their own estimation, and to increase, in a slight degree, the price of labor, by enlarging the amount of their immediate wants: but society gains upon the whole by these establishments. They should therefore be encouraged by the state,

and subjected to such regulations as are likely to ensure their utility, and proper administration.

The education of the lower classes is a subject which I must treat of with great caution. There are many good philosophers, who patronise the progress of unlimited education: I am one of the comparatively few men, who, although in the warmest manner attached to the useful diffusion of science, would not have the working classes devoted to those higher pursuits of literature, which are not suited to the occupations of mechanics, and which, in their close application, enervate the body, lessen the disposition for subordination, excite a spirit inconsistent with contentment in an inferior grade of society, and seem calculated to break down the barriers of rank, the preservation of which, it is upon almost all hands agreed, is vitally-essential to the well-being of the state. Not that I would restrain the operations of individual mind, which in the cases of Brindley, and Arkwright, and Watt, and Banks, with admirable perseverance and skill, burst asunder the fetters of their situation, and rose to eminence and usefulness; not that I would, in an enlightened nation, exclude the common people from the benefits of reading, writing, and religion; but, I would not bestow upon them, a kind of education unfitted to their habits of life, and unsuited to the necessity for their obtaining a livelihood, by the work of their hands. These views may be correct, or they may be otherwise: I am seriously and maturely impressed with their soundness, and therefore feel it to be my duty not to flinch from a declaration of them. If they be, in themselves, devoid of benevolence, I must satisfy

myself with the consolation, that they are not dictated by a spirit of illiberality. Time will show who are in the right.

XXIX. A national power which has a high regard Of sobriety. for the practice of virtue, will enforce the observance of general sobriety by its subjects. I do not mean, that it will severely punish every instance of slight indiscretion, caused by seductive hilarity; nor that it will, with an over-rigid criticism, check every enjoyment of that generous pleasantry to which artificial beverages give such frequent rise: but when decorum is grossly broken through; when intoxication causes an unhappy neglect of some of the important duties of life; when the excesses of the bottle are made the excuse for immorality or disorder, it becomes the guardian power of the nation to preserve the public from the fearful influences of the delusive poison. This rule of government will be found either more or less to apply to all countries.

It is an erroneous notion, that the enjoyment of intoxicating liquors and drugs is peculiar to northern nations: the ancient Greeks and Persians were by no means free from this vice; the modern Frenchmen and Spaniards were, until lately, addicted to it, although, at least among the former, the practice is now abandoned. The Turks, too, are still remarkable for their attachment to exhilarating opium, although they refrain from fermented liquors.

XXX. A corporation derives its privileges from the Of corporations. sovereign, who is the source of all inferior honor,

power, and dignity. It is a body incorporated indivisibly together. It has frequently a presiding chief at the head of it. A body politic is said never to die, because the law supposes that at the instant that a part of it drops off, another object supplies the place of the dissolved branch. Although this contemplation of law is correct enough, every body corporate is destructible by the natural dissolution of all its members.

Corporations are either sole, consisting but of one person; or aggregate, consisting of more persons than one. Thus, for instance, in England, his Majesty is a sole corporation, as the law will not suppose the existence of an interregnum. The royal society of literature is a corporation aggregate, consisting of the president and fellows.

Corporations are again divided into civil and eleemosynary. The names which are given to them upon institution, are strictly preserved, for they point out their identity. Sir Edward Coke terms their institutive names their "names of baptism." He ingeniously lays down corporations to be invisible objects.

The breach of the trusts upon which charters are granted, works their forfeiture.

Legal amend-
ments.

XXXI. The amendment of the law, according to times and circumstances, is a subject of the utmost gravity. Experiments in legislation have this peculiarity: whilst they afford scope to the vision of the law-maker, they diminish the popular respect for the laws. Little dependence is reposed upon a continually-

changing will. The people will not treat with reverence, laws which are made to-day, and repealed to-morrow. But occasional legal amendments are essential to the welfare of every country. Happy is it for nations when deliberative calmness and prophetic wisdom inspire the minds of their legislators. It must be acknowledged with pain, that lawyers, who can best know the imperfections of the law, and point out their proper remedies, are generally the most reluctant to consent to changes, however important.

Plato(a) has probably expressed himself too positively upon the alteration of public laws: for if his advice were adopted, we should entertain the greatest fear in altering a national enactment, necessary as its alteration might appear. My readers, if they have had the patience to read my work thus far, will acknowledge me to be no friend to innovation: but I must admit the necessity for the occasional revision and correction of the laws. The age of prophecy has ceased: and if the laws made to-day, infallibly suit the purposes of the time, it does not follow that they will be expedient a century hence. "*Malum notum, et cui jam assueveris, tolerabile,*" is an argument not well applied by Louis le Roy, in his edition of Aristotle's Politics, to the subject of legal amendments.

Although law is the perfection of reason, yet every man is not therefore at liberty to raise his own structure of legal right, and proclaim it the temple of jurisprudence. Those only are properly competent to

(a) De Leg. lib. vii.

judge of the justice of the law, who are acquainted with its general branches and minute ramifications, and can reason well upon the consequences which their determinations would give rise to; for men of the most penetrative intellect may either precipitately or deliberately fix, in their own minds, standards of right and wrong—juridical rules—and plausible apophthegms, which, if applied to the subject, might produce the most fearful and deranging results.

The very severe manner in which, as Demosthenes informs us in his oration against Timocrates, propounders of new laws were treated in Locris, if it were justifiable at all, could be so only upon the ground of the popular nature of the government. It is enough for a friend of the state to be subjected to the pains of unfolding the consequences of a particular legislative enactment—of holding up its evils to public view—and of proposing some cautious revision or amendment, without being, for an intentionally good act, degraded by wearing a halter, and without being strangled, if upon mature and general consideration of the subject, his views should not be found unobjectionable. Either the law proposed to be amended must have been very bad, or patriotism must have been very great, to have induced a citizen to have risked the consequences prescribed by the constitution of the state. It must afford us but little surprise, to find that no law was made in Locris, during the space of two hundred years, from the fear of suffering the penalties of this rigorous regulation.

The frequent changing of laws, as it lessens the po-

pular reverence for them, so it diminishes the influence of their authority. But as they must be suited to the state and circumstances of the times, and the wants and inclinations of the country; and as political philosophy, like natural wisdom, is disposed to advance with the experience of mankind, the laws must be altered from time to time as occasion requires.

The systems of national jurisprudence are generally found to be complicated in proportion to the antiquity, opulence, and civilisation of the people. In a barbarous nation, a few simple laws are generally found sufficient. Its wants are limited and uniform; much is left to the discretion of the judges: but, as a country advances in civilisation—as its commercial intercourse expands—as it cultivates the diversifying arts of ingenuity, its administrative form of government becomes more extensive. New and complicated systems of precaution are found necessary to guard the rights and riches of the people. The knowledge arising from experience is called into legislative action. The most ingenious operations of mind are directed to the expansion and completion of the political system. Strict and tenacious checks, of various species, but of the same genus, are found necessary to prevent the people from encroaching upon the royal prerogative and revenues. Careful counterchecks are dictated by a spirit of liberty, and adopted by a sense of justice, to guard the people from those fearful encroachments of the crown, which might be exercised by an ungenerous monarch. But it by no means follows from these principles, that the national system of statutes should not be as concise, clear, and intelligible, as

the interests of all the members of the state will allow.

Experimental laws, or those made for the purpose of trying the pulse of the people, betray the ignorance of the rulers, who ought to know the general disposition of the community.

Of legislative
digests.

XXXII. There is no principle of jurisprudence more important than this:—That the laws of a country should be embodied in a clear and intelligible manner, in order that the subjects may be enabled to understand the political regulations to which they are subject, as easily as the case will admit of. The complexity of national statutes is incompatible with a sound system of legislation. It has been said to be an impossible task effectually to condense the laws of a nation of any consequence. I shall therefore state the national digests which have actually been made, and many of which have been found to answer in a high degree the objects for which they were compiled.

The laws of France were compressed into the size of a thick duodecimo volume, called "*les cinq codes*," by command of Louis XVIII.

In Denmark, the laws were consolidated, by command of Christian V. in the year 1683; and it is said, that the entire body of danish law is contained in one volume quarto, so clearly worded, as not to require comment.

The king of Sardinia, in 1723, published a code of laws, which had the highly-beneficial effect of relieving his subjects from vexatious suits. Much outcry was raised against the act, by the lawyers of his do-

minions, but he allowed the consideration of the public advantage to prevail.

The "Caroline code," as the body of statutes of Charles V. is termed, is the foundation of the Swiss penal laws.

A legal digest was ratified by the states of the diet of Sweden, in 1734, and was confirmed by the king, in 1736.

The codes of Ivan IV., and Alexèy Mitikhailovitch, having been, in several particulars, abrogated by succeeding sovereigns, the russian laws became perplexingly intricate and unintelligible. Catharine II., endued with the true spirit of a wise legislatrix, presented to her grateful subjects a simple code of reformed laws, putting an end to the previous darkness, confusion, and injustice of judicial administration. The execution of this grand task would have been a monument of glory to any monarch: it was peculiarly so to a despotic empress. The instructions which she gave for drawing up the statutory table, exhibit principles of liberty which might scarcely have been expected in such a state.

Governor-general Hastings, the steady promoter of oriental literature, caused institutes of the hindostanee laws to be completed in 1775, by eleven learned brahmins. Thus were the laws of Hindostan, which had been scattered through various books, upon different subjects, collected together in a portable volume.

The rules to be observed in the preparation of a national digest, are:—1. To abolish all useless laws or statutes. 2. To preserve those which are useful, and exclude those which are obscure. 3. To reject

such as are of doubtful meaning, and to substitute for them laws of clear expression. 4. To repeal those which are *ad idem*, or mean the same thing. 5. To abridge such as are too long. 6. To classify the digest, for easy reference. 7. In carrying these rules into effect, to preserve mediocrity, and not fly into extremes.

Of outlaws.

XXXIII. Outlaws are persons who, by contumacy, are deprived of political protection.

Capital outlawry is generally of an irremediable character.

In civil cases, the party, upon doing full right to the persons wronged, is inlawed.

CHAPTER V.



OF THE INTERPRETATION OF LAWS.

§ I. THE principle before laid down, as to promises and contracts^(a), will serve to explain the groundwork of legal interpretation. The intention of the legislator must appear from his external words; and must not be judged of simply by any internal intention, whether properly or improperly ascribed to him. We can understand, and therefore we can be bound, by his will, only so far as he has expressed it for our guidance. The ascertaining of such intention, from the external signs which he has used for its expression, is called 'interpretation.'

Definition & importance of interpretation.

The interpretation of the laws is frequently a task of considerable difficulty. That laws are sometimes construed in opposition to the intention of the law-makers, is a fact, which, however unfortunate, experience compels us to admit.

(a) See book. i. c. 8 & 9.

We shall be immediately satisfied of the importance of interpretation, if we consider how liable men are to convey an expression of mind different from what they intend. Neither our minds, nor our tongues, nor our hands are infallible. The same words will sometimes bear various, if not adverse meanings. Men, often from inattention, often from natural imperfection, and often from tedious lengthiness or immoderate conciseness, are obscure, when it is or ought to be their object to use distinct and intelligible words. It then becomes the office of interpretation to construe the signs used, in a natural way, or rather in the manner most probably agreeable to the will of the law-maker.

The general
rules of inter-
pretation.

II. The general interpretative rules are:—

1. To ascertain, as nearly as it is possible, by all the means which reason teaches the use of, the intention of the legislature, in framing the law under consideration, and to determine thereby. The writing should be so interpreted, that it shall, to its utmost capable extent, have the effect which was intended.
2. In judging of the literal meanings of words, to pursue the sense which is most in common use. It is true, that that sense is frequently contrary to etymological and grammatical refinement. But the experience of every hour convinces us, that it is most safe to accept such meaning of words, as is usually received amongst men: it is custom, not criticism, which establishes the signification of language.
3. Always to pursue a rational interpretation, and not to be bound by a merely literal one, plainly con-

trary to common sense. For subtilly to comply with the mere letter, without observing the manifest spirit, is rather disobedience, than submission.

4. Never to recur to any external facts, or other writings, for the sake of interpretation, unless unavoidably necessary for justice' sake. If we cannot fairly determine, without reference to other writings, or external circumstances, we should recur to them, so as they are such only as are immediately and personally connected with the legislator. This is what is called 'making him a commentator upon himself.'

5. If two laws, by a rare and an un contemplated accident, clash together, so that both cannot possibly be performed, we must, by the best exercise of our reason, determine which we may pass over, most agreeably with the legislator's intention upon the whole.

6. If two laws, relating precisely to the same subject-matter, be made at different times, and be contrary to each other, the latter must be taken to be a repeal of the former. Legislative contrariety cannot be presumed.

7. If there be two contemporaneous laws—one general, and the other particular; the latter must prevail, as an exception intended to the former.

8. To conclude a penal law to be more binding, than one that is contemporaneous with it, and not penal; for in the eye of the legislator, the former has clearly been regarded of the more importance; and upon the same principle, to regard that law to be the more obligatory, which imposes the higher penalty, when there are two interfering laws, in the same case, imposing different penalties.

9. In the case of two interfering laws, to follow that

one which is clearly productive of the most beneficial results, if to do so be consistent with the legislator's will, so far as we can ascertain it.

10. That which is enjoined, is to be preferred to that which is permitted—that which is definite to what is indefinite—the public benefit to private advantage—and the more general object to the less general. The consideration of imperfect obligation yields to that of perfect.

11. Laws which appear the same, have not always the same motive.

12. We must judge of the construction of particular paragraphs or words, by the subject-matter and context.

13. We must give to the words some meaning, if it be applicable. Otherwise we do not interpret; but only declare that no meaning is expressed.

14. Never to apply a law to a thing which it is certain that the legislator did not by any means contemplate.

15. Not to interpret at all, where no rational interpretation can be adopted; and not to render such a construction, as the legislator never could have intended.

16. Where there are two senses, the one agreeable to the subject, natural, and reasonable—the other the contrary, to adopt the former.

17. Not implicitly to accept the literal sense, if it render the law null, ineffectual, or absurd.

18. To construe in cases of ambiguity, according to such meaning as is most consistent with the other laws of the land.

19. The certainty of interpretation will be in pro-

portion to the openly-declared object of the law-maker.

20. If the law be ancient and ambiguous, to attend to the contemporary, or more nearly-contemporary interpretation of it, unless they be clearly erroneous. For being founded on a better knowledge of the reason of the law, and the facts which gave rise to it, they are more likely to have the design of the legislator, for their basis. And if such former interpretations be contemporary, there is reason to conclude that the law would have been set right, if the interpretative effect had been wrong.

21. To interpret, not from the reason upon which the legislator might, with apparent wisdom, have proceeded, but from the reason on which he actually did proceed.

22. The legislator may guard against future latitude of interpretation, according to his discretion; for that limitation is declarative of the mode in which his meaning shall be received or understood.

Most of these rules will be found referable to the solution of promises and contracts.

CHAPTER VI.

OF CIVIL SUBJECTION AND PUBLIC LIBERTY.

**Definition of
subjection in
general.** § I. THE state of subjection is the being liable to act at the authoritative discretion of another party. It therefore differs from that of a simple, precise, and limited obligation.

**Definition of
civil subjec-
tion.** II. Civil subjection is the state of liability which men labor under, to obey the directions of the common judgment, for the common good.

**General view
of subjection.** III. In societies, the several members are, when considered distinctly, equal to one another; and any subjection due, is to the collective body.

Civil subjection is different from public subjection. The former is for the benefit of the subject; but the latter is the contrary. Those who are, for offences, condemned to perform public work, for a certain time, are in public, and not in civil subjection, to the state.

Civil subjection, however despotic, or apparently absolute, thus differs from slavery:—Civil subjection re-

lates only to the government of the country; or, in other words, of the individuals composing it. Each subject has an interest in the prosperity of the collective body, and in the preservation of the established laws of the country; and would be in a state of nature with the civil governor, if he openly broke them. The observance of no law which tends immediately to subvert the objects of the social union, is imperative. The subjection is consequently, to a certain extent, imperfect.

IV. A citizen is subject, even to the extent of life, to the state; and is obliged to take up arms valiantly, on being required; and not to render himself unfit for the purpose. The general good is constituted of the public and private services of the subjects. A subject is bound not to accept a national office which he knows himself to be disqualified for.

Of the duties
of civil subjection.

If a citizen be required to be given up to a foreign state, he should avoid, as much as possible, bringing his country into danger or ruin. He is bound to submit to an equal chance with the other citizens, by lot, or otherwise, as generally agreed on, as the fairest method. But he may save himself from his enemy by flight or stratagem. If, unhappily, his endeavours fail, he must submit, as patiently as he can, to his fate. As to the state, it is bound to defend him as vigorously as it can, consistently with its safety; but not so as to bring about its own ruin; for that cannot be assumed to benefit him, nor can he require the sacrifice of many, for the sake of one. The state is not at liberty to deliver him up, or to cause him to surrender himself; but may banish him, if it be less severe than to give him

up. The interest of the state should be regarded as being consistent with his. Citizens should be treated as rational creatures.

Of civil liberty.

V. Civil liberty is the power of free action allowed by the laws of the civil society, of which we are members. The term is sometimes prostituted to express a licence of acting contrary to the natural and social obligations.

The degree of enjoyment of this liberty depends upon two things: the nature of the constitution; and the talents, character, and principles of the civil rulers. For there is no constitution so debased, that great good cannot be accomplished by its administrators, if they be just and talented men; nor is there any constitution of so perfect a nature, that it infallibly protects the subjects from the consequences likely to be entailed by wicked or ignorant ministers of state.

Genuine political freedom is that state in which the wisdom of the laws, and the impartiality of their administration, secure to a man the fullest possession of his natural rights, consistent with the existence and perfection of the society.

Universal freedom consists in the greatest political happiness of the greatest number of mankind.

The state may put down all assemblies tending to its ruin, or immediately opposed to its objects. Civil laws generally produce, rather than infringe upon, sound and useful liberty.

Every noble mind is attached to genuine liberty, but the fact cannot be dissembled, that the most ardent professors of it are often the greatest oppressors, and therefore the shameful profaners of the goddess whom

they profess to adore. The 'inalienable rights of man,' as they are called, are sometimes dwelt upon: as, for instance, the alleged rights of personal representation in the affairs of a country, and of resisting supposedly-unjust political power. But natural equalization and political equalization are different things. There are many rights vested in us by the law of nature, which become modified through the operation of the laws of nations. If every natural right were argued upon as a necessarily-political one, we should be often fatally misled.

VI. It is inconsistent with the law of nature, and therefore with the law of nations, to subject the exercise of religion to human constraint, or to compel men, by force of any kind, to adopt a particular creed. For every man is at liberty to consult and act upon his own judgment, in things purely concerning himself. And it is obviously every person's interest to adopt that faith which he believes to be the most true, and conducive to his happiness. The peculiar nature of religion, and the varying religious sentiments of mankind, render this liberty of discretion necessary. Sovereigns have no right to prescribe, although they are entitled to recommend, a particular religion to their subjects. But, as I have shown, under the head of religious establishments, the governing power may regulate the concerns of religion, so far as is consistent with natural religious liberty. Toleration is ever conducive to truth. The observance of every form of religion, which bears the semblance of decency, should be protected by the state. No persons should be excluded from political offices, on account of religious opinions; unless those opinions be immediately adverse to the established form of go-

Of toleration.

vernment. There is a wide distinction between toleration, and the approval of a creed. Penal laws, as to religion, should be avoided as much as is consistent with sound civil happiness. Not to tolerate dissenters, is injustice (a).

Persecution is the infliction of unnecessary pain or inconvenience, on account of particular theological opinions, or of a peculiar form of worship.

Wise laws afford as much religious toleration as is consistent with the peace and prosperity of the country. None should be excluded from a share in the government, who can be safely admitted to its participation. It is dangerous to interfere with the exercise of conscience in religious matters. The protection of the rites of religion is not incompatible with the fair freedom of religious worship. The exercise of such freedom must necessarily be subject to the control of the political power, for the protection of the general interests of the community. The protecting guard must, whether there be a particular religious establishment, or not, extend so far as to prevent any persons from sustaining physical inconveniences, inflicted by others, under the pretence of performing religious offices. If this salutary principle were not adopted, the most inconvenient consequences to society would necessarily result. As it has been before observed, even the exercises of devotion might be disturbed, with impunity, by the members of other religious persuasions, under the mask of religious liberty. The most noisy, disgusting, and immoral acts might be committed under the veil of toleration. The happiness of mankind therefore imperatively requires that

(a) See Bishop of Bristol's Serm. before the Lords, June 11th, 1747.

the civil restraint should be imposed to a certain extent. There is nothing in that restraint, when moderately exercised, inconsistent with the most perfect political enjoyment. It protects all men, and injures none. This doctrine, essential as it is, has been condemned as unjust. Men should not too hastily sacrifice the interests of political happiness to the wildness of sectarian enthusiasm.

Many sects have owed their degradation to the political inconveniences to which their religious opinions have exposed them. The Jews would not have been at present so low in the estimation of mankind, but for the great sufferings to which they have been subjected. A race of Jews rejecting the talmud, who are established in the Crimea, and enjoy perfect civil freedom there, are said to be distinguished throughout Tartary, for their probity and manliness. It is interesting to the political philosopher to compare their civil state, with that of the Jews residing in some european countries.

VII. In a social state, we subject ourselves to the public will. We are therefore bound to obey a firmly-settled dynasty or form of government. We are obliged to obey, as king, the reigning sovereign *de facto*. He who actually holds the crown, and exercises the rights of sovereignty, must be supposed to have the better title to it. For subjects to be at liberty to investigate, with a curious eye, the title of sovereigns, would be a licence contrary to the public good. He who is once firmly and justly established as king, with the consent of the majority of the nation, is as much king, as if he could trace a regal inheritance

The duty of obedience to the established government.

through a long line of ancestry. Nothing renders government more respected, than the previous ravages of anarchy (a).

Submission to the general will is indispensable to the general safety. If subjects were at liberty to disclaim such legislative decisions as were repugnant to their views, and to adopt only such as were agreeable to them, there would be no power but that of counsel reposed in the legislature.

A very dangerous doctrine is afloat, that a nation, or a branch of it, may, at pleasure, release itself from the dominion of the governing power, if the majority of the subjects adopt the belief that its dissolution is productive of public good. Ireland, or Scotland, or Canada, may, it is said, determine its relation to the government of England, whenever it is so pleased. This is one of the many sophistical errors which result from the non-admission of compact as the ground of social obligation. As well might it be contended, that the inhabitants of the little county of Essex are at liberty now to disclaim the power of our most gracious sovereign, to return to the political division of the Saxon heptarchy, and to place the descendant of Sigered, who by force was compelled to resign the crown to Egbert, upon the throne, if he could be identified. It is the extreme of public ingratitude, for a colony or fractional part of the state, to avail itself of the benefit of the parental government, but to rebel against it at the first convenient opportunity. An individual subject has just as much right, of his own mere accord, to rebel against his sovereign, as a

(a) See *Observ. sur L'Hist. de Fr. par L'Abbé De Mably. Avertissem.*

portion of the country, whilst the existing constitution is observed.

VIII. The right of resistance to a civil power has given rise to much controversy. He who resists the proper power, is, no doubt, guilty of a moral wrong. But the previous contents of this book must have satisfied the reader, that all resistance to the person upon whom the civil power has been conferred, is not immoral or unlawful. There must be a latent right of resistance, if the government act contrarily to the pact.

Of resistance
to civil power.

The following rules will fix the exact limits of resistance, on any occasion of controversy upon the subject:—The right of resistance commences at that precise point at which the duty of civil subjection ceases; allegiance and protection being always correlative. The existence of an ultimate or natural right of resistance, does not justify the inference that civil power is inalienably in the people. There is no civil power, however absolute, which is not under some obligations to those whom it governs. And if such obligations be not performed, their infraction is tyranny, and may lawfully be resisted. The people have no right to depose or to resist a reigning power who has not wilfully abused his trust, by unconstitutional acts; for they have given him a right to hold the kingly office so long as he uses it justly. A people may depose a sovereign who has broken his part of the compact, subverted the fundamental ends of the society (*a*), delivered the community over to

(*a*) See Ruth. Inst. ii. p. 416.—*Defence de la Nation Britannique*, p. 260.
—*Buchanan. De Jure Regni apud Scotos.*—*Lex, Rex.*—*Jus Populi Vindicatum.*

the subjection of another person or power, or openly abandoned his post; because, by such acts, he forfeits his power. A prince and people, at variance, are in a state of nature, with regard to each other. Subjects cannot be supposed to grant to monarchs the power of violently depriving them of their rights. The people may resist the commencement of tyranny. If they were to wait until the tyrannic objects were completed, no people would be secure. Mere errors in government are not sufficient reasons for the governed to resist; but when government strikes at the foundation of the people's rights and liberties, resistance is not only lawful, but necessary (*a*) and commendable. If circumstances will permit, the people should first complain. And they should never exercise unnecessary or vindictive violence (*b*). The resistance of the people, upon slight occasions, cannot be justified by any view of expediency. The people must, in the nature of things, be the judge, whether the potentate has broken his trust. It is a groundless objection to maintain that this power of judgment may be abused. By the law of nature, every man must, in the exercise of his own reason, judge in what cases his natural rights are infringed upon. This arises from the necessity of the case. And there is no such thing as a right, without the power of enforcing it. It follows that the people never may resist the civil power, properly so called; for it has only just jurisdiction. 'Civil war,' then, is an anomalous term. 'Intestine violence' is

(*a*) See Burnet's Hist. Own Times.—Mackenzie's *Jus Regium*, pp. 95, and 122.

(*b*) See Barclay contra. Mon. lib. iii. c. 8 et 16.—Bishop Bilson.—Bracton.—Fortescue.—Hook. Ecc. Pol.

a more correct expression, although not a complete one. The people may oppose all acts which the civil power does not include. Deeds of unconstitutional oppression cannot be acts of the civil power, which, politically speaking, never commits injustice. A part of a state cannot, of its mere will, dismember itself. Lastly, to interfere with the discretion constitutionally vested in the political governors, is unjust rebellion.

The polish kings were accustomed to sign concessions of power called *pacta conventa*, providing that if they broke the laws, their subjects should be dissolved from their allegiance. This, however, is not necessary, in order to vest in the people an ultimate right of justice.

IX. The doctrine of divine right (a) is unfounded. The doctrine of divine right. If it were true, it would not justify the wrong acts of princes. The all-searching eye of Philosophy has lately, amidst her enquiries into the secrets of natural and moral processes, not forbore to lay open the mysteries of political subjection; and we are no longer accustomed to respect the sovereign, excepting as the legally constituted leader of public affairs.

X. The power of kings, being founded upon reason, Of rebellion and treason.

(a) See Paley, book vi. c. 4.—Hutcheson on Beauty and Virt. Treat. ii. sec. 2, 3.—Sir R. Filmer's Patriarcha.—Sir G. Mackenzie's Jus Regium.—Augustin. De Civit. Dei, lib. v. c. 21.—Tertull. Apol. contra Gentes.—Belarmine de Laico, c. 6.—Duvalius de Suprem. Potest. Rom. Pontif. p. 1. q. 2.—Burlamaq. ii. p. 44.—Graswinckelius de Jur. Majest. c. 1 & 2.—Hesiod in Theog. v. 96.—Hom. Il. i. v. 197.—Themist. Orat. 5.—Plato de Leg.—Dolman.—Godw. Pol. Just. i. p. 2.—Ruth. Inst. ii. p. 406.

should be treated with respect. When the people have appointed a sovereign, he, and not they, possesses the supreme power (*a*). He therefore is the judge of public actions. The security of monarchs depends upon the justice of their subjects.

The horrors of levelling rebellion excite the dread and antipathy of all well-disposed men. The extravagant revolutions of the restless multitude afford no hope of social comfort, under their guidance, even to the most zealous supporters of popular dominion. The french revolution has now, for many years, passed away. We may therefore profit by the unhappy events which it disclosed. A political dissension, which, in its infancy, was approved of by some wise and good men, produced consequences at which the least humane turn pale. Intestine divisions, which were, possibly, justifiable in their origin, far from procuring repose and happiness for the people, led them to the commission of acts which for a time greatly tarnished the honor of the french name. A country delightful in its climate, and gay in its manners, was covered with gloom, dismay, and blood. A nation proverbial for its politeness, was governed by a legislature of ferocious barbarity, over whose debates Madness reigned. Those who had indulged in visions of liberty were compelled to witness scenes of turbulent and unbounded horror. "Blood! Blood!" "Rapine! Rapine!" were the frightful sounds which every where prevailed. At length a chaos in politics ensued. At length the people sunk under exhaustion, and a revo-

(*a*) See contra:—Franc. Hotoman.—Junius Brutus.—Sidney.—Milton.—Althusius.—Pareus.

lution, which was continued for the visionary purpose of annihilating monarchy, terminated in its more complete establishment.

Pretended love of liberty is continually made the pretext for most disgraceful political acts. The king, from his acquaintance with the secrets of state, and association with the management of government, is less likely to be fallible, than are they whose ignorance and violence lead them constantly into caprice and tumult. All governments are under the obligation to punish traitorous disturbers of the public order. To kill the sovereign power, whilst exercising his legitimate sway, is the height of treason.

Subjects do not, by rebellion, lose their right to the protection of the laws. A king or state making terms of peace or compromise with rebellious subjects, is bound to observe them, unless they be obtained by fraud or unjust terror; for such agreements imply indemnity for the past (*a*).

XI. Patriotism is a virtuous attachment to our Of patriotism. country. It is approved in all ages and nations. It consists in our obedience to the moral and civil laws; in our readiness to devote our talents, persons, and property, to the interests of our country, rather injuring ourselves than our state; and in the love of rational liberty.

Every subject has it in his power, by patriotic efforts, to increase the happiness of his country. There is no individual so low in rank, as to be incapable of practising the virtue of patriotism. Nadir Shah was

(*a*) See contra:—Boxhornius, and Lipsius.

once so pleased with the dramatic performance of an actor named Tucki, that he promised to comply with such request as he should make to him. The comedian, instead of asking for gold or power, instantly obeyed the patriotic emotion which agitated his noble breast, and availed himself of the happy opportunity of relieving from famine the inhabitants of Delhi, who had been cruelly confined within the walls.

CHAPTER VII.

OF NATIONAL CONSTITUTIONS.

§ I. A NATIONAL constitution is the established form of governing a country.

Definition of
a national con-
stitution.

II. The formation of civil society does not necessarily limit to a few individuals, or to one person, the possession of exclusive legislative authority.

Of the mode
in which it is
formed.

Nor does it essentially exclude women from being a part of the legislative body; for, in a state of nature, they are, when single, as much entitled to liberty of action, as men; and in joining civil society, they have as much claim to suffrage. If it were contrary to the nature of civil society for women to legislate, they could not become sovereigns, as they occasionally do. Compact only can exclude them from a share in legislation. The dogma, that they have not sufficient reason for the exercise of sound political judgment, is an ill-natured sarcasm, too obviously false to be worthy of a reply.

The same reasoning will apply to those civil minors,

who are naturally of age; and to persons not possessed of lands or houses.

There must then, first, be a contract to join the society; and secondly, submission to the restricted form of legislation, before any less number than the whole of the members of the political body can enjoy the full civil power. The compact to join the society must, in the order of time, precede that of restricted legislation; but both compacts may be tacitly expressed. And the latter may immediately follow the former.

The form of the constitution originally depends upon the voice of the community. It is for the people to decide upon the political system, to which they are to be subject.

The several
kinds of go-
vernment.

III. There are three simple forms of national government: monarchy, aristocracy, and democracy; besides mixed constitutions.

Of monarchy.

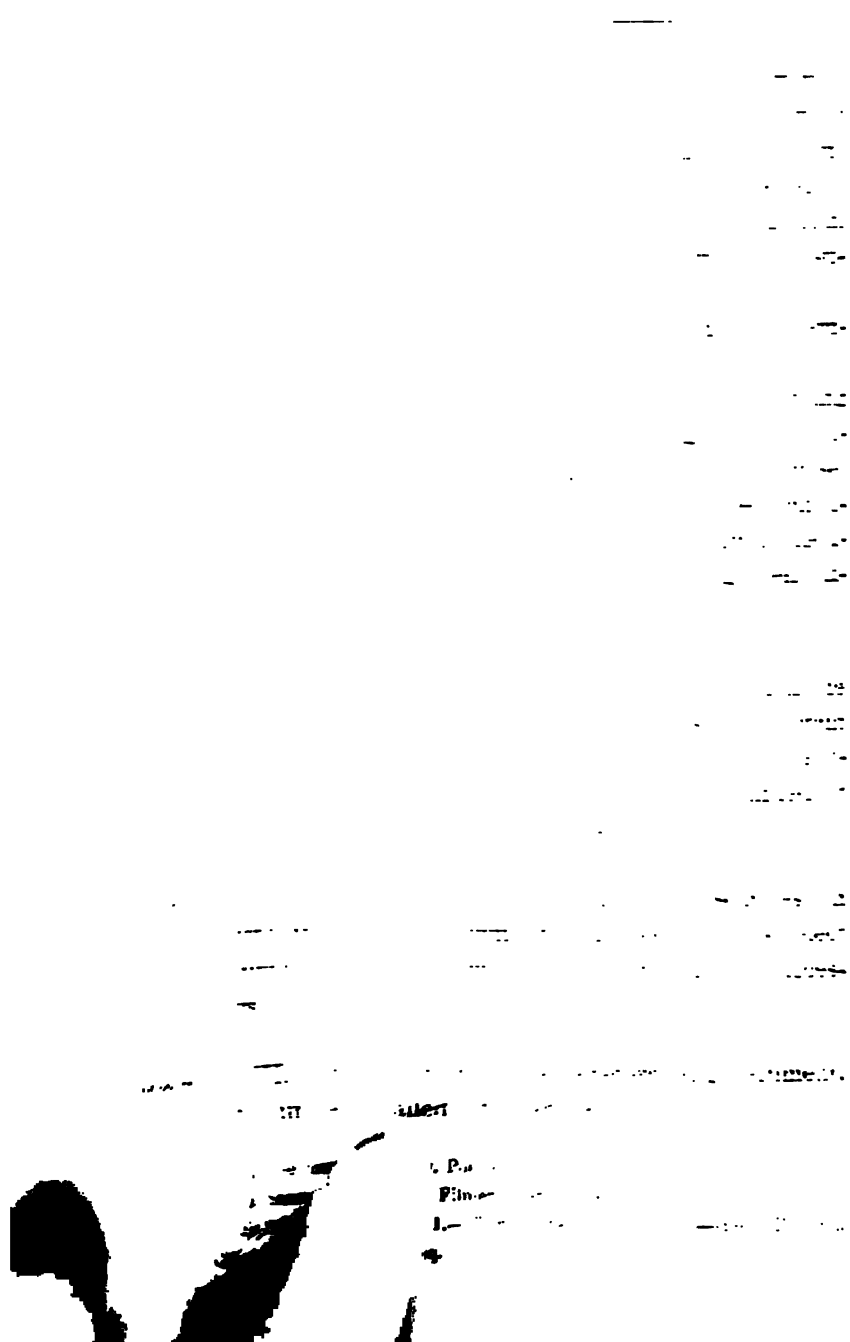
IV. A monarchy is that form of government, in which one individual exercises independent sovereign authority. Upon his demise, his power is usually transmitted to his heir.

In order to constitute a monarchy, it is not sufficient merely that an individual should be at the head of the government. It is moreover necessary that he should possess the most essential rights of sovereignty, but particularly that he should be invested with independence of action. The doge of Venice possessed the shadow of majesty, but could scarcely be termed a sovereign, as he was allowed little or none of the independence and discretion of a monarch. He was not permitted to pardon a single offender, nor to leave his city, or mar-

ry a royal personage, without the licence of the council; nor to be free from the supervision of the members of that council; nor to accept presents from a foreign monarch; nor to appoint his brothers or children to office; nor to resign his dignity, although he was always subject to deposition; nor to sign or seal the letters of credence; nor to open the letters from foreign courts, although they were usually addressed to him. To crown these odious disabilities, his person was always subject to the intrusion of the state-inquisitors; he was not allowed to decide upon any matters of state, without the co-operation of the council; and the very constitution, of which he was the professed head, was termed a republic. The only compensation which he received for these deprivations of power, if compensation it may be called, was an extraordinary share of outward show, the cost of which was far too great to be defrayed out of the twelve thousand venetian ducats allowed to him as revenue. Who would term a noble personage, whose power was so much fettered, an independent monarch?

A king is the constitutional superior of his people, so long as he keeps his compact with them; but upon his breaking it, they are upon a natural equality.

Sovereignty, in its original form, excludes an implication of the right of alienation; but the people may expressly grant to monarchs a full power of disposing of the succession to the crown, either during their lives, or after their deaths; as such disposition is not inconsistent with the nature and end of civil government. But plenitude of disposition does not imply a plenitude of uncontrollable power; and *vice versa*. In order to explain myself more clearly: the constitution



VIII. A democracy, which was probably the first kind of government, is a national constitution, in which either the greater part of the people governed, or a select number of men, freely chosen by and from the collective body, govern the state. Of democracy.

In a democracy, as well as in an aristocracy, if there be no appointment of a casting vote, the majority of voices prevails; and upon an equality of numbers nothing is done.

IX. A mixed constitution is that in which two or three of the above forms are intermixed. Of mixed constitutions.

X. The people ordain the mode of sovereign succession. Of regal succession.

Those who live under an hereditary monarchy, will not fail to estimate the advantages of hereditary succession. The certainty of the successor to the crown, upon the death of the sovereign, is an important political advantage. Public contention, and the many inconveniences of a regal election, are avoided by this now well-established mode of dominion. The knowledge of hereditary transmission, is endearing and useful to a sovereign. The most flattering, I had almost said, the noblest, feelings of mankind, are roused, in the mind of the monarch, to acts of public virtue, by the consciousness that he will, at his decease, transmit the splendid honors of his crown to his natural descendants, in continued succession. The system, besides, secures that nobility of education, and that respect for the person of the prince, which are essential to the glory of his reign. It provides, too, that constitutional stability, which tends so greatly to

promote the national improvement, interest, and renown.

The rules of hereditary succession to sovereignty are the same as those of descent (a), excepting that only the eldest daughter succeeds, instead of all the daughters taking as co-heiresses.

Of the salic law.

XI. In France, and in some other countries, a law, termed the salic law, excludes all females from the throne, chiefly with the view of continuing the crown in the hands of the direct line of male descendants, and of preventing the royal lineage from undergoing those dismemberments and changes which, through regal marriages, attend a contrary form of succession. It will not escape the attention of the political philosopher, that the lines of Pharamond, Pepin, and Capet, have occupied the french throne for the space of 1400 years. The salic law is so called from the Salians, whom Mezeray terms, "*le plus noble peuple des Francois.*"

In Prussia, Spain, and Denmark, the females are ineligible, until the extinction of the males.

Of despotic governments.

XII. Governments are despotic, when the legislative and executive branches of power are united in one individual or body.

In a despotic monarchy, they are united in one person—

In a despotic aristocracy, in several nobles—

In a despotic democracy, in the people, or their representatives—

In a mixed despotism, in two or more of such three forms compounded.

(a) See ch. iv.

A despotic government too often provides for the minority, at the expence of the majority. Its people must always labor under a dread, lest a sovereign, with the fearful vices of a Caligula, should succeed to one who rules with the admirable equity of a Titus.

Where unlimited political power is confided to an individual, there is, judging from the general disposition of mankind, much reason to apprehend attacks upon the liberty of the subjects. Happy are those countries in which some salutary checks, useful to the people, and honorable to the sovereign, are imposed upon the supreme governor.

But as every man may surrender all his natural liberty to the purpose of civil government, under any form, it is not true that an absolute monarch has no just power, as Aristotle and Locke, those illustrious philosophers, have maintained (*a*). And that great benefit cannot result from the exercise of despotic power, is impossible of demonstration: it may, in the hands of a Deioces, a Codrus, a Cyrus, a Charlemagne, an Alfred, a Gustavus Vasa, a Louis XII., a Muhammed Akbar, or a Francis, be rendered the instrument of glorious, although not perfect happiness.

A good despotism is the best, because it is the most effectual, government in the world.

Much as the true friends of liberty are to be admired, we are by no means bound to follow the enthusiastic notions of those who would uproot all despotic governments, upon the ground of their absolutism. Let such individuals but for a moment consider

(*a*) Aristot. Pol. lib. iv. c. 10.—Locke on Gov. book ii. sec. 90.

how politically impossible it is for a sovereign power to be established without the popular consent.

A despot is not necessarily a tyrant, as he is commonly supposed to be. The word 'despotism' implies that form of government, in which the making of laws absolutely depends upon the will of the monarch alone. A despotism exercised by a very virtuous man, is productive of the highest advantages to the society over which he presides. Justice is much more expeditiously and uninterruptedly administered by one will, than where many wills are consulted. But as the infirmity of mankind renders the possession of this power dangerous to the liberties of nations, there exists, in many countries, a rational dislike to despotic establishments.

Of patrimonial kingdoms.

XIII. Patrimonial kingdoms are those in which the sovereign may dispose of the succession, either upon his abdication, or death; but they should be entirely disposed of, and not divided into small sovereignties (*a*); for kingdoms are indivisible without popular consent. The division of the state into fractional parts is by no means a necessary consequence, as Grotius contends, of the appointment of patrimonial monarchy.

No kingdoms are patrimonial, but those which the consent of the people has made so; and then only to the extent conceded by them.

The people ought to reserve some certain mode of deciding disputed-patrimonial succession.

Of elective sovereignties.

XIV. The two eminent advantages of an elective monarchy, are the fact of the choice of the people be-

(*a*) See contra:—Grotius.

ing made by the majority of them; and the therefore-probable wisdom and goodness of the person elected.

We may class amongst the objections to an elective monarchy, in addition to those suggested in the eighth section, the natural probability of undue influences supplying, in many instances, the place of impartial choice. The imperfections of mankind will too often induce the elected sovereign to regard those who vote against him, as his enemies. The bad consequences of an interregnum, the interruption of popular avocations, and the many litigated questions likely to arise as to voting, are evils peculiarly attending this kind of national constitution. The tendency of an elective government to popular disturbances, and bloodshed, is, of itself, a powerful ground of objection, in the contemplation of all peaceably-disposed men.

As the people naturally look forward to the time when an elective monarch will part with his regality, and become a fraction of themselves, they do not view him with that awful respect, which attends a sovereign for life.

XV. Tyranny is the use of sovereign power unjustly, and contrarily to its trust.

*Of tyranny
and its depo-
sition.*

There can be no authority contrary or superior to the laws (*a*). The greater part of the public has therefore a natural right to judge when the sovereign has committed a fundamental breach of his compact; and in such an event immediately to depose the usurping power (*b*), and abolish or modify the lately-existing

(*a*) See King Jas. I. Speeches in Parl. 1603 & 1609.—Locke on Gov. book ii. sec. 199, 202, 206.—Millar's Hist. View of Engl. Gov. iii. p. 316.

(*b*) See ch. vi.

form of government; for if one party to a pact break his part of it, the other is discharged from the previously-existing obligation. But if the people pass over the act, the waiver confirms the sovereign's subsequent dominion. Monarchs are not subject to be disturbed in their sovereignty, at the mere pleasure of their subjects.

The people have also a right, if it be necessary, to banish their head, after deposition; whether it consist of one person, or of many persons, in order to prevent future usurpation. And they may justly, for the same purpose, prohibit the returning of their late governor into the country, under the penalty of immediate death.

If it be obvious that their late chief will, if permitted to go into exile, raise a sedition, they may imprison him. And if, after absolute deposition, the deposed power wage war against them, they, that is any one or more of them, may, when attacked, unless restrained by some public law, put that power, whether consisting of one person, or of many persons, to death, if necessity require it, in order to prevent future oppression and injury. But it is unlawful to kill a person, for acts done during sovereignty.

I gladly leave the subject of tyranny, in order to treat of one of far-higher interest.

Comparative
advantages of
the several
kinds of go-
vernment.

XVI. It is a political axiom, that all civil government is instituted for the benefit of those who are governed by it. No duty is more imperative upon a nation, than to choose the constitution best adapted to its circumstances, and most likely to lead to its preservation and happiness.

Every sovereign, however absolute in his power, is

but a representative of the people. He is, according to proper language, not their master, but their governor. Submission to any control, exceeding the end of government, cannot partake of the nature of political subjection. Slavery, therefore, is a state of private obedience. The very establishment of a society implies a state of freedom in those who institute it.

And as the common benefit of the whole is the object which every legitimate government has in view, it becomes not only highly interesting, but also extremely important, to enquire into the comparative benefits and inconveniences of the several modes of government established by mankind.

And first, of a monarchy: Its advantages are—its similarity to the parental authority;—its unity, and therefore immediateness of judgment—its consequent secrecy, decision, dispatch, and military strength—its exclusion of contentions (*a*), intrigues, and ambitious attempts in the state—when hereditary, its certainty of succession—and its identity of censure, in cases of violation of treaties.

Under an absolute system of monarchy, it is to be feared that the sovereign will be ready to take to himself all such sources of comfort as he can secure, at the expence of the community at large, without incurring the probable risk of losing his crown. To maintain him to be infallible, is to argue that men will voluntarily protect the rights of others, and that all government is therefore unnecessary.

An aristocracy is liable to many more objections than a monarchical government.

(*a*) See contra: Aristot. Pol. lib. iii. c. 16.

Hereditary nobility seldom carries with it the stimuli to the attainment of very high intellectual powers. The natural cupidity of men will cause them to consult their own enjoyment, at the expence of the other part of the community, thus defeating the end of their appointment. In an aristocracy, there is also much probability of internal dissension.

An aristocracy, as it consists of men of education, and therefore probably of prudence and reflection, is generally the most fit to mature the plans of the law; and to discover the modes by which they shall be carried into execution.

This form of constitution is in general less acceptable to the people than a despotism. They find it more conducive to their interest, to have one monarch, than several absolute governors. We cannot then wonder much at the danish revolution, which abolished the senatorial prerogatives, and vested in Frederic III. despotic sway.

Without noticing the natural impossibility of a large number of men, subject to the contingencies and ever-varying circumstances of life, attending in popular assembly; the consideration of the neglect of labor, and therefore the loss of property, which would attend the constant assembling together of a strict democracy, immediately satisfies us of its inaptitude, and of the very short existence which it would have amongst any people; even if its debates were always most circum-spect and moderate. And if it were convenient for them all to assemble, the perpetual agitation, caprice, delay, publicity of proceeding, want of order, ambition, and discord incidental to a congregated mixture

of men, would soon show the necessity for a more limited attendance.

A democracy is generally the most fit form to fix the objects and views of the law, as it is usually actuated by public spirit and patriotism.

There is no argument more conclusive against unqualified popular government, than that of Lycurgus: that the trial of the democratic system in a family, is a sufficient proof of the superiority even of oligarchy to it.

Where the above three forms exist aggregately, the mutually-resisting power—the mutual ability to check any innovation attempted by the other two branches, is productive of the happiest and most lasting results. The negative power, possessed by each branch of the state, of rejecting the will of the other, restrains any invasion upon public liberty or happiness, attempted by the other two parts, or by either of them. In such a form of government, the balance of power, and the balance of interest, should be most carefully preserved.

The cretan, the lacedemonian, the carthaginian, the roman, and the venetian commonwealths, although they have been sometimes considered democracies, more or less exhibited a compound of monarchical, aristocratical, and popular power. Crete was anciently a kingdom. The Cretans afterwards had their cosmi, and their council. The offices of the lacedemonian kings, ephori, and senate, were similar to the kings, lords, and commons of some present countries. The lacedemonian state, it will be remembered, retained with grandeur that form of government for seven

hundred years. Although the administration of the civil power of the Carthaginians savored of oligarchy, yet they had their kings, their ephori, and their senators. The government of Carthage precisely resembled that of Lacedemonia, excepting that the choice of their kings and ephori was of a different form. The carthaginian empire was great—her power was grecian-like—her riches persian-like. She was, in general, remarkably free from sedition and tyranny. For many hundreds of years her character was mighty. In hardiness, splendid as she was, she is said to have surpassed all other powers. And even when the bitter ravages of Rome had rased her fortresses, and deprived her of her weapons, with a wonderful and most exemplary intrepidity, which cannot be too highly commended, she faced the extreme necessities of war, and defended her liberty, so dear to her, until Scipio at length tearfully snatched from her magnificent brow, that laurel of independence, which so long had added grace to it. We find the government of Rome compounded of consuls, senators, and people. Venice was governed by a doge.

General rules
by which they
may be ascer-
tained.

XVII. This chapter cannot be better concluded, than by stating, in a summary manner, the rules which must be always observed, in arguing upon and determining the comparative advantages of the several kinds of government:—

1. Every man naturally desires the greatest possible gratification of his will. But as a man's desires cannot be fully satisfied, unless all other men act conformably to his wishes; every man will endeavor, by all the

influence in his power, to render others subservient to those wishes, without a proper regard to their enjoyment and natural rights.

2. As no limits can be prescribed to the natural desire of enjoyment; neither can any bounds be fixed to the exercise of the means which will be made use of, to attain the end.

3. Men will not, without the fear or infliction of pain, surrender their natural gratifications. They will, upon the contrary, avoid what is painful or disagreeable to them.

4. Strictly absolute power therefore immediately tends, not only to deprive others of the general sources of enjoyment; but also to subject them to the severest pains, for disobedience to the unlimited will.

5. Every man, over whom such power extends, is involved in the obedience, and is therefore always liable to suffer under its exercise.

6. Exact equality of power, in two or three separate branches of government, cannot be ascertained by any criterion; and its discovery therefore is not to be expected.

7. The idea of equality then being chimerical; an inequality of power must be presumed, in the two or three constituent parts.

8. The strongest power will naturally always endeavor to gain an accession of strength, and eventually to annihilate the weaker.

9. Inequality of power then, in such a case, contains the seeds of destruction of the system existing.

10. The talents or virtues of men in government, at a particular period, form no certain guide to judge of what will be the merits of their successors.

11. If there be three parties to the government, each completely-powerful in itself, it may be rationally anticipated that in the course of time, and at a favorable opportunity, two of them will combine and abolish the third.

12. The varying circumstances of things should always be considered in the establishment of a political state.

13. The pure and continual admixture of the three disjunctive forms of government, is, for the reasons above-assigned, impossible.

The premises then justify the conclusion, that it is only by curbing the power of the parties to the state, by mutual and efficient checks, that completely good government can be established.

15. The body so employed to check, must have a power fully sufficient for the purpose.

16. Its interest must be the same, or as nearly as it is possible the same, with that of the community.

17. As the community at large cannot, for the reasons in this book before assigned, act deliberately, their representatives must act for them.

18. The quantum of power to be checked, is so much as those who possess it, are liable to misapply to private, instead of properly-political purposes.

19. The shorter the time is, during which the representatives enjoy their power, separately from the community, the less likely is their misapplication of it. But—

20. The period of representative duration should be that which is liable to the least political inconveniences.

CHAPTER VIII.

OF SOVEREIGNS, PUBLIC OFFICERS, &c.

§ I. THOSE who are best qualified should be chosen to elective offices. Men should not desire places for which they are not fitted. It is clearly contrary to the public interest to sell the departments of public trust, or to obtain them by any other corrupt means.

Of their qualifications, and general duties.

Sovereigns and public ministers should perform their trusts as much as possible for the national good intended by their appointment, and not with any sordid motive. They should not render their employments the instruments of corrupt gain. They should inflict upon none needless severities. In dispensing honors, rewards, and offices, they should purely consult the good of their community. They should be faithful to the laws and their trust, competent, diligent, impartial, well-informed and dexterous, courageous, dignified and firm, candid, consistent, prudent, free from obstinacy, and devoted to the public benefit.

Inferior officers should obey their superiors, excepting in things clearly and indefensibly unjust. Power, virtue, and wisdom, are the three great essentialities of government. The happiness and glory of the people are the best proof of the goodness and talents of the ministers of a state. Upon them the brilliancy of the government principally depends. The administrative branch of power should be distinguished by prudence,—the military, by bravery,—the fiscal, by honesty—the judicial, by justice.

Of the rights
of sovereigns.

II. Having before treated of sovereign power, and its prerogative (a), it will not be necessary to amplify upon the kingly office. The rights of a monarch arise from all such powers as his office necessarily implies, and as are consistent with the constitution of the country of which he is the governor. The object of sovereignty being the benefit of the state, it generally includes whatever is necessary for that end. He is, by his magistrates, the administrator of the civil and criminal laws. He has the command of all persons and places within the state.—To such prerogatives, or dispensing powers, as are vested in him by the laws; to the faithful obedience and ready respect of his subjects; and to their co-operation, in all his lawful commands.—To sacred inviolability of person. The sovereign is the society personified; and should be placed above the apprehension of personal danger. States could not exist, if kings were subject to the malicious con-

(a) See ch. iii.

rages, or capricious attacks of every dissatisfied individual, or seditious mal-content.

To superiority over penal laws. A sovereign, politically speaking, has the power of preventing, but not of doing, wrong. In him are vested the irresistible exercise of all the functions reposed in him by the constitution.

The king is generally the fountain of justice, property, and honor.

Subjects are bound to obey a king *de facto*, manifestly exercising the rights and duties of sovereignty (a). Otherwise there would be endless bloodshed. To consult the tranquillity of the country, must be presumed to be the most ardent wish of the real sovereign.

Public law, from motives of political necessity, sometimes permits the divorces of monarchs, for causes insufficient for the purpose in private cases.

III. A good and talented sovereign will reign over his subjects according to the laws, upon which his authority depends. It is not contemplated that a king shall have the power to do harm to the community. He will acquire the knowledge of useful government, and watch over and advance the prosperity, security, and glory of all his subjects, to the utmost of his power: and for this purpose maintain honorable peace; enter into prudent treaties; practice justice, moderation, and valor; select good and wise ministers; become acquainted with the constitution, real condition, and circumstances of the nation; promote social harmony; provide for the popular wants; encour-

Of the duties
of sovereigns.

(a) See contra:—Turnb. Hein. ii. sec. 228.—Sydney on Gov. c. iii. sec. 35.
—Stat. of Hen. VII. of England.

age industry and population; reward patriotic and learned men; remedy all imperfections; inquire into alleged abuses within the scope of his royal jurisdiction; ascertain the defects of the laws; and encourage religion, morality, and useful education: considering the happiness of his people the supreme law of the state; regarding his crown as the glorious gift of his people, rather than as inherently derivative from his ancestors; and desiring the happiness of his subjects, in preference to the gratification of his private ambition. He will not fail to lay out the taxes as intended by the legislature. He will protect every subject from injury and wrong; so as such defence do not more harm than good to the state; will prevent the spread of obviously wicked notions; and will use his prerogative, on all occasions, for the public benefit. He will always deign to listen to the respectful complaints of his subjects, and be accessible to them. He will be just, merciful, virtuous, generous, and accomplished; overcoming his passions, and dismissing caprices from his mind. He will ensure the esteem of foreign states, by observing international law, faithfully keeping his public pacts, and undertaking only just enterprises against enemies. Possessing refined courage, he will pursue undauntedly that which is virtuous.

Kings are not bound to consult any persons as to the exercise of their power. Sovereigns were anciently chosen for their integrity and talents. This consideration should lead them to pursue such conduct as will render them beloved by their subjects, contemporaries, and posterity. Happy will be the children of nations, if their monarchs, in imitating the inviolability and splendor of Deioces, will also remem-

ber, and apply to their own sway; the talents and virtues of that exemplary arbitrator of Media, which elevated him to the then-new kingly office.

Limited sovereigns forfeit their crown, if they grossly and wilfully violate the limits prescribed to them by the constitution.

Subjects are so variously and oppositely constituted, that the best king cannot, with reason, expect to please all his subjects. Patriotism, uprightness, and goodwill, are qualities which will not fail to endear a sovereign to that portion of his people, whose esteem confers upon him glory. We are told by Xenophon, that Cyrus exhibited in his life a noble pattern of moderation, with the hope, that the bright example of the prince, who was his own master, might cause the people to imitate his temperance and other virtues, to the honor of their king, and to the advantage of the state. This conduct was founded upon the deepest knowledge of mankind. We find the most unimportant fashions which a monarch sets to his people, often eagerly imitated, merely upon account of the illustrious station of the individual who has established them. How much more should the impressive example of a truly noble prince be followed by his subjects! How much more eager should they be to imitate a pattern of excellent conduct, set before them by a sovereign, in the highest degree worthy of their obedience and regard!

IV. A supreme power cannot limit its potency. For a man to control his own authority, is an absurdity.

Of sovereigns generally.

No sovereign, however absolute, has a right to all-

enate or divide his kingdom, without the popular consent(a). Kings are always subject to the laws of nature.

If circumstances ever justify the trial of kings, it can only be by the cool tests of reason and truth. Few, indeed, are the instances in which passion has not had the ascendancy in proceedings of such a nature. A king is very differently circumstanced from an ordinary individual. His punishment usually produces those consequences, which are to be justified only upon the highest ground of public necessity.

The royal power is supreme, and is not to be overthrown, by private attempts. This principle is as just as it is convenient. In the monarch are vested the political understanding, and the political will. He should have negative power against the resolutions of the parliament; but not power to alter the statutes. His executive authority should be absolute. He ought neither to debate in parliament, nor to propose new laws. Unlimited power is not essential to regal greatness.

It is the duty of the state to take care that the identity of the monarch, and the rules of regal succession, shall be clearly defined; so that no subject shall have reasonable cause for doubt.

Sovereigns should not be unjustly or ungenerously vilified after their death; but their characters are then subject to just censures for public misconduct, the political relation being determined by their death. But good subjects will rather err on the side of admiration, than of opprobrium. The difficulty of reigning

(a) See contra:—Spav. Puff. ii. p. 223.—Burlamaq. ii. p. 215.

will induce just men to make liberal allowances for the faults of government.

A man is not at liberty to use forms of worship with regard to a king(a). To them the eternal Deity only is entitled.

V. The art of governing can scarcely be said to consist of more than the application of the duties of a man in private life to the affairs of the state. The glorious things accomplished by a sovereign, will, it is true, be in proportion to the richness of his talents: the good things, however, which he does, will be proportioned to the amiability of his heart. Often does History record the dignity of conduct of those who have been elevated to the head of governments, from the inferior rank. This would be a sufficient proof, if proof of so clear a principle were wanting, that good sense and justice are the first requisites in governing a civil body. Candor compels me to make the painful admission, that the continued separateness of rank of monarchs, has often led them to the commission of unkind, and, if I may so speak, of unjust acts. Far, however, be it from me, to lay down the application of this fact too broadly, or to allege it in support of an elective form of government.

The art of governing.

Sovereign power being instituted by the citizens, for the common good, and not for individual gratification, can justly be exerted with reference only to the welfare of the community. In this plain proposition is developed the sublime secret of great and useful dominion.

If every monarch would constantly follow the pure

(a) See Herodot. lib. vii. sec. 136.

spirit of the laws, instead of merely complying with their letter, the safety and happiness of nations would be inconceivably promoted. Kings would then dismiss from their minds the hope of indulging those personal gratifications which cannot be attained but at the expense of their subjects, and therefore to the regret of good men. The public benefit would then be so scrupulously regarded, that the lasting interest of each citizen would be the dearest wish of the monarch's heart. Avarice would be the last desire of his noble mind. Caprice would be known to him only in word, as in the examples of other men. Honors and offices would be distributed with justice and caution. The good would always be rewarded. The wicked would always be punished. Sedition against systems characterised by virtue would be well repressed by powers conscious of their own integrity. But why do I speak of sedition against the sway of a good and useful monarch, as if its commission were possible amidst the blessings which he diffuses over the land?—Because I am painfully convinced that to reign with uprightness is not always to please the people. The very inflexibility of justice, which procured for Aristides a most equitable epithet, consigned him afterwards to the penalty of banishment.

The science of knowing men is of the highest importance to a monarch, as it enables him to dispose of them to the best advantage of the state, by applying their respective talents to the situations to which they are best adapted.

It is indispensable, in a plan of good government, to select not only just and able men, to fill the public offices, but also such as are well affected towards the

institutions which it is their business to support and promote. If they be in principle opposed to them—if they have a strong dislike to them—if they have even a little antipathy towards them, they will frequently use their exertions, either secretly or openly, to undermine the establishments which they conceive to be objectionable, and in the end to substitute those to which they are attached. Important political changes are often effected by means apparently insignificant, and by degrees almost imperceptible.

Political contentions between the rich and the poor, should be a subject of deep attention in the monarch's mind. He should first have recourse to all the palliatives which are likely to redress the evil. If they fail, he has no choice but to resort to force. He must not, from a feeling of timidity, allow the state to fall. He must resort to that exercise of imperial power, which, though painful at the moment of infliction, is essential to ultimate tranquillity. The rich must not despotise over the poor: the poor must, with becoming humility, respect the rich. Both should so use their stations as to produce general good. These evils, like all others, are much sooner checked in their beginning, than after their advancement: it is easy to extinguish a spark, but difficult to put out a flame. Cato, with an eye of prophecy peculiar to wisdom, saw that destruction of the roman commonwealth which originated in the reconciliation by Cæsar, of Pompey and Crassus. It is a mark of great skill to detect evils in their bud: it is a sign of great wisdom instantly to take precautionary measures against them. It is necessary for a prince regnant not only to know the ends of his government, but also to be well acquainted with the means by which those ends shall be accomplished.

The art of government is a theme so extensive, that it might, with all its numerous illustrations, and with all its possible cases, fill a thousand volumes. The subject may therefore be here concluded: it is sufficient to state the general principles upon which the minor propositions must be founded.

Of regents.

VI. The rights of regents are the same as those of sovereigns, excepting so far as they are limited by the state.

Their duties are:—To submit quietly to the limitations of power ordained by the constituting body; to perform all the duties of a sovereign above stated; and to surrender their power when it is legally determined.

Whilst the mother of a lastly-deceased king is enfeinte, the state is governed, as during a minority, by a regency.

Of the nobles.

VII. The honors of nobility were originally attached to public employments, but they are generally now simply titular. Noble distinctions ensure the approbation of men, when acquired in a glorious manner. The granting of nobility is an easy mode of rewarding public servants, and by highly exciting emulation, produces great public vigor. The legislative assembly of the nobles operates as a salutary check upon the rashness or inconsiderateness of the representative house. As the king's counsellors, they should exercise patriotism, wisdom, and justice, never forgetting that they hold their offices for the public benefit.

They should be distinguished for public usefulness, talents, birth, riches, or political enterprise, and not placed exactly on a political level with other subjects.

They should have a legislative voice; and, in some cases, hereditary privileges. They should have power to try their own body. It is often politically convenient for them to be a court of appeal from courts below, and a court criminal, to punish state officers.

I know not for what reason very learned men, who have not enjoyed offices of state, are so frequently excluded from the investiture of nobility, unless it be on account of their usually-moderate fortunes. Amongst those highly-useful subjects, who are rewarded with that honor, men of high science might be well classed; although it must be conceded, that, whilst the reigning prince should, upon the one hand, be inclined thus to reward the successful devotees of learning, he should, upon the other, guard against a dangerous increase of the aristocratic branch of the state, particularly as to comparatively-poor individuals, who have not the means of maintaining that independence, which should characterise the nobles of a country.

Hereditary nobility is not free from objections. It is the duty of the state well to consider how it will provide for the descendants of those whom it invests with nobility, and whom it therefore, to a certain extent, precludes from the common offices of society. An overgrown nobility (it is my very high respect for rank which induces me thus to speak,) has two great evils: it lowers the value of the noble grade, and it cramps the public revenue. In China, the emperor grants nobility for a few generations, in proportion to the merit of the original noble.

VIII. As many of the subjects should have the power of delegating representatives, as is consistent with the safety and prosperity of the state. In a pure re-

Of representa-
tives.

presentation, the members of the senate are identified with the people.

Representatives, if of separate provinces, each having distinct interests, should inform their constituents of the legislative measures in agitation; take their instructions, and carefully consult their particular advantages, even in cases in which they conflict with those of all the other provinces. The representatives of the seven united provinces were subject to this kind of obligation. But it is otherwise if they be elected by counties or towns, in order to represent the whole country.

They should assist in making laws, but should not execute them. They should have the power of raising supplies, of addressing the king, and of adopting resolutions upon public matters. It is essential for them to have the fullest information upon the subjects of their deliberation; and as a body, they have therefore the power to call for persons, papers, and records.

Of ministers
of state.

IX. Sovereigns may appoint chief ministers, so as they do not transfer to them their own absolute power. Civil officers should act as public guardians. It is their duty to account the safety and welfare of the subjects, as their grand aim, without allowing personal advantage to impair, or interfere with it. They are bound to take such care of the collective body, that all may be equally protected. They should be strictly attentive to the orders of the sovereign power, and they are protected in performing its just commands. Their government must be according to the laws faithfully administered. In cases of doubt, they should determine by public policy. They are to be judged by their design, and attention to the imperial orders;

and not by the casual event. They may be punished, if they pervert their offices to unjust ends. They are responsible to the legislature, for any wrongful assistance given to the king.

Good statesmen will cautiously guard against financial difficulties, which so frequently bring about revolutions.

It can scarcely be disputed, that public ministers have sometimes difficulties of an extraordinary character to surmount; but good sense and upright intentions will generally carry them well through the performance of all their duties.

X. Men are so partial to their own interests, that indifferent judges of controversies are absolutely necessary. As their decisions are the interpretations of the law, they should be well skilled in general and particular jurisprudence, and in the full possession of mental faculties. Dignity, rather than haughtiness, becomes them. Impartiality and patience are indispensable for them. They should not confine their good nature to the advocates of their bar, or insist upon judicial disputes being referred. They who do not desire that the public should have for them the highest esteem, are unworthy of their offices. It is not desirable for them to be of familiar access with the multitude. Above all things, they should be good men. In administering justice, it is not for judges to hunt after difficulties, upon points on which all the parties concerned agree.

Subjects should not be made to suffer for acts done, under the express authority of officers publicly constituted for the purpose. It is an inconsistency in the

law of some countries, to appoint commissioners to adjudicate upon questions of law, and afterwards, by means of a higher tribunal, to overrule their decisions; and cause the actor in the suit to suffer, in damages, for carrying into operation the mistaken judgment of those in whom the law originally vested the decision.

The judges should be impartially chosen from the body of the lawyers, and should be independent in salaries and expectation, and few in number. They should be, in their respective courts, of an uneven number, so that precedents may be established. They ought to be liable to be discharged, and punished for corruption.

of ordinary
magistrate.

XI. It is the duty of an ordinary magistrate, in his public acts, to consider particularly the benefit and protection of the county, province, or city, over which he is commissioned to preside. His duty is performed by diligent inquiry, observation, and reflection; providing for the rational wants of the people; and enforcing the laws, according to just rules of interpretation. For these purposes, he must attend to the impartial and equal preservation of the rights of the citizens, over whose interests he presides, and be easy of access, executing his duty with industry, firmness, fidelity, and benevolence; and exhibiting an exemplary pattern of virtue in his private life. A highly-useful magistrate will be diligent, skilled in the laws, resolute in their enforcement, equally attentive to the rational complaints of all, opposed to vexatious litigation, and choice in the selection of friends.

XII. Other judicial officers should consult justice and the public good. Of other judicial officers.

Amongst the inferior judicial officers, may be reckoned the attornies; and, in some countries, the barristers. It is imperative upon them to use the same diligence in their clients' business, as in their own, to be guilty of no fraud or deception, to put their clients to no expense which has not their benefit in view, to avoid sophistical disputation, to discourage revengeful litigation, quell the passions of the turbulent, advise the ignorant, assist the poor and oppressed, expedite suits, cause no circuitous delays, and charge only a reasonable compensation for their trouble. Integrity, talent, and energy, are their best characteristics. It is their duty to suggest remedies for the removal of existing legal defects. The practitioners of the law must be best acquainted with legal imperfections.

The legal profession is a most laborious one, and requires the closest mental application. To be distinguished for a sound knowledge of its principles, is an honor which unfortunately few will take the trouble to attain. To gain a clear and comprehensive acquaintance with legal history, and universal and particular jurisprudence, to trace analogies, distinguish between contending precedents, unravel intricate points of dispute, separate realities from fictions, and address juries with precision, if not with elegance, forms a task frequently requiring the most acute penetration, and most masterly genius. A highly accomplished and honest lawyer is an extremely useful servant of the community.

XIII. Public holidays, when numerous, are extremely injurious to public justice. They either totally im-

Of public holidays.

pede the business of the subjects, or put the parties to unreasonable expense, in purchasing the civility of the law-officers, or of other persons in public situations, whose duty, as public servants, requires them to be in attendance.

Of the clergy. XIV. The clergy form a most important branch of the state; and are entitled to respect in the exercise of their functions.

The inculcation of religion generally requires that its teachers should be well skilled in history, logic, mathematics, philology, and argumentation. The duties of pastors are so varied, and numerous, as to preclude from their pursuits any other occupation. Lastly, it is for the good of the country, that they should not mingle their duties with secular employments. It is upon these grounds, and upon that of the necessity for teachers of theology and morals throughout the country, that a separate establishment of clergy is raised and provided for, by states.

Clergymen are not at liberty to sell the enjoyment of the sacred office. It is necessary for them to be of an excellent character. Precept opposed to the practice of the preceptor, is of little avail. They ought to be learned in every thing relating to their profession, and as grave as their profession requires; loving truth and peace, and never bearing arms when it can be avoided (*a*). They should not be collectively opposed to the institutions of government, or interfere unnecessarily with the civil part of it; although there appears to be no reason why, as individual subjects, they should not have a right to act and vote.

(*a*) See Words of Charlemagne. *Observ. de De Mably*, liv. i.

The clergy should be independent. Their object should be, not to support state intrigues, but to administer the offices of religion, and to guide men into the paths of general virtue.

XV. The science of war is incapable of perfection, without a regular and practised institution. No subject is at liberty to make war without the public employment, unless his person, family, or property, be so suddenly attacked, that he cannot call in the aid of the executive power.

Of the army
and navy.

National combatants, which term includes soldiers and king's sailors, neither lose the rights, nor are freed from the duties of citizens. Officers are bound to obey the laws of their country, and international law; to carry their instructions into complete effect, if possible; to exercise and inure their men, preserve them from all unnecessary privations and injuries, protect them in all honest demands, and inspire them with courage and patriotic feelings. Their bravery and skill, if united with prudence and mercy, cannot fail to endear them to their country.

They are invested with all the authority necessary to quell mutiny.

The obligations which apply, as well to subordinate combatants, as to their commanders, are—not to desert their post, even if immediate death be apparent; to be satisfied with their pay, unless grossly unreasonable; to bear patiently the fatigues and hazards required by the cause of their country; to be brave, but not rash; to prefer a glorious death to a shameful escape; and to do no causeless harm to their countrymen or others.

General officers and admirals must be presumed to have all the power necessary to release the army or the state; unless expressly restrained.

The governor of a place or fort is necessarily authorised, without instructions, to repel any attack or approach of an enemy; but not to carry war into his territory.

Military and naval officers are often placed in perilous and critical situations, in which the interests of their country, and even of mercy and justice, require that they should act with unhesitating promptitude. On such occasions, vacillancy is cruelty, and cowardice is insanity. Noble minds want only the energy imparted by causes, to incite them to bold and determined acts of useful enterprise. The extreme perils of war sometimes justify a large exercise of discretion in military officers. Some have condemned the conduct of the english military commander, in the East Indies, who, in his late attack upon the Burmese, finding that some of the native troops under his command would not fight, planted his guns upon them, as a terrible example to the rest. But when we consider that the cowardice of the sepoy placed our army in immediate danger, and would, if it had not been punished, been followed by the many soldiers of color in the english service—when we remember, that without such an exemplary infliction, perhaps the english empire in India would have been at stake—when we reflect, that it is mercy to kill a few, in order to save many, we cease to condemn the collected conduct of our fellow countryman, as inconsistent with military glory.

Commanders who are over-careful of their persons and comforts, will seldom inspire confidence in their

men. It is essential to their success, that they show themselves frequently to them, and that they partake of their perils. Napoleon successfully acted upon this principle. Nadir Shah, and Tamerlane, practically discovered its powerful influence; while Selymus, who was ill-suited to succeed to Solyman the magnificent, carrying on his wars by his lieutenants, gained but little success. The present fashion, for kings seldom to intermeddle personally in public affairs, is much to be deplored; for it deprives them of innumerable opportunities of doing good.

The preservation of the army, and of the country, depends upon the strict obedience of common combatants to their officers.

Soldiers should be, for popular safety, raised or provided for yearly, as much as possible united and identified with the people, and governed solely by the executive power. But these rules, like most others, must give way to public necessity.

Courts martial should rather aid than obstruct the process of the ordinary courts of the realm.

XVI. Persons enjoying titles or distinctions, whether of a noble, professional, or literary character, which proceed from the sovereign power, and show the rank, rights, and authority, to which the parties enjoying them are entitled, should be respected by the subjects of a state.

Of literary dignities.

To be distinguished for talent in literature or science, must be most gratifying to every man who is ambitious of serving his fellow-creatures.

The duties of professors and fellows of colleges, or royal societies, are—to make no by-laws contrary to

the supreme ones; to promote those purposes for which their establishments are incorporated; to forward the interests of public and private virtue, to which all literature should be devoted; and to teach nothing which is hurtful to the state which incorporates them or sanctions their dignities^(a); or inconsistent with reason. This is required by the highly-honorable distinctions with which they are invested.

Of the deputies of public officers.

XVII. It is obligatory upon public officers to execute their duties personally. In the following cases, they are precluded from appointing deputies to supply their places:—

1. Judges.
2. Where a post is filled, upon the express confidence, that the individual shall himself perform the office.
3. Deputies cannot appoint substitutes. An agent must stand in the immediate place of his principal.

(a) See laws of royal soc. of lit.

CHAPTER IX.



OF CHANGES IN POLITICAL CONSTITUTIONS.

§ I. EVERY agreement is liable to dissolution; and as the civil state arises from a compact, it is easily understood that its existence may cease.

The civil state liable to dissolution.

II. The popular obligation to obey a government, may be positively determined:—

The modes in which the change may be positively effected.

1. By the mutual consent of the several parties to the social compact.

2. By the potentate's open violation of that compact—in other words, by his subversion of the laws.

3. By regal abdication.

4. Upon failure, by death, or the lawful exile of the supreme governors.

5. By the necessity of conquest.

In such cases the people regain their original liberty of choosing what form of government they will establish, for general benefit.

The representative part of the legislature cannot, by its consent, bind the people to a sudden and unconstitutional change in the form of government; for they have not a discretion contrary to the fundamental prin-

ciples of the constitution. But if the legislature assume such power, the quiet and voluntary submission of the people evidences their assent.

The change of constitution, to be valid, must be either unanimous, or approved by a majority of the members of the state. But the dissentients have a right to quit the society which has undergone a virtual dissolution, with their moveables; and sell the lands possessed by them at the time of change, to natives.

Gradual
change, by
usage.

III. Usage being evidence of kingly and popular compact, a civil constitution may be, by degrees, changed a little, or much, by continued and voluntary practice; which furnishes sufficient testimony of the tacit consent of all the parties, if the original possession of the right were not obtained by unjust force.

Change is not
effected by
unjust force.

IV. Unjust force, either on the part of the reigning power, or of the people, will not effect a legal change in a constitution. Prescription, in this case, as in all others, cannot justify possession of that which was, from the first, dishonestly acquired.

Abdication of
reigning power.

V. A king may abdicate his sovereignty. A monarch who has openly and voluntarily resigned his crown, cannot afterwards exercise royal sway, unless he be reconstituted by the people.

A sovereign, by abdicating his crown, deprives his heirs, lineally-hereditary, as well as simply-hereditary, of the right of succession; for they cannot, at their ancestor's death, acquire from him that which he did not then possess. This principle should teach monarchs

to consider well before they surrender, not only out of their own, but also out of their children's hands, the precious gem of sovereign power.

Upon the abdication of the supreme potentate, the people is at liberty to institute any form of government in their discretion.

Desertion from the realm, without the consent of the people, has been, by some authors, treated of as abdication. But it may be more properly considered as a violation of the regal compact of protection. For a king may, and sometimes does, of his free accord, leave his territorial confines, and still publish acts of sovereignty, in which case he cannot be supposed to abdicate the crown; unless the code of laws to which he is subject, expressly provide, that such desertion shall be construed into an act of abdication.

VI. It will not be useless to define the identity of a state. Identity of a state.

The sameness of a state consists in compact. The social condition of conformity, when it first takes place in a country, does not arise from the existence of a number of individuals there; but from the immediate union, from the enacted laws, and from the customs tacitly consented to.

VII. The members of the political state, like those of the physical body, are continually undergoing important and essential changes; but those alterations do not annihilate the social existence. Natural philosophers have shown, that our bodies are completely altered in substance, in the space of a few years; but Identity of a state not destroyed by natural changes.

that fact has never given rise to the conclusion that our bodies have not the same moral identity, or separate and actual existence. So it is with the civil state. Because new members perpetually supply the places of those who have left the vital stage, they are not the less therefore parts of the social body, than their predecessors were.

Cessation of a
state.

VIII. The cessation of a state may take place:—By the extinction of all the members forming it—By the dissolution of it with the mutual consent of the several parties composing it—By their accidental, voluntary, or externally-compulsory dispersion, rendering the performance of the objects of social union impossible—By the state's becoming a province of some other territory, either by treaty of cession justly obtained, which excludes future claim, or by violence from without. For then the common understanding dies.

On such cessation, the civil rights are put an end to. But the individual or moral rights of the members, as to life, reputation, liberty, land, goods, and private debts, although they may be, in the nature of things, affected by the civil termination, yet are not lost by social destruction. To take them away, would be to inflict causeless harm on the losers. Those rights only are lost, which could not exist without the state.

A government does not cease to exist, in consequence of an alteration in its constitution: for the social compact—the very essence of a state, still remains. Its rights and obligations therefore are not cancelled by such change.

IX. The consolidation of two social bodies does not render one of them a province of the other. If the same monarch govern two distinct states, they are not therefore civilly united. And as his compact with each must be distinct, he cannot, of himself, unite them. Each country still enjoys its fundamental laws. But if, according to the civil law, his right to govern one of them be absolutely consequential upon his right to govern the other, the former may be called a province.

Of two countries vested in one sovereign.

If a state be, by convention, or otherwise, annexed as a province to another, upon the express condition of its existing civil laws being preserved, nothing but the popular consent will ever justify the substitution of other laws there.

If two or more states have mutually agreed to perform some certain object, it does not imply dependency in one or any of them. It only proves a diminution of liberty of action, so far as the accomplishment of the purpose intended applies.

It often occurs, that a people improves or degenerates in its habits, feelings of justice, valor, learning, or ingenuity; but the members of a social body are not the less a nation, because they are inferior, or superior, in virtue or attainments, to their predecessors or ancestors.

X. As men cannot be subject to a social compact, without their own consent, a nation cannot justly, by conquest, be rendered a province of another country, without the consent of the parties to the existing compact.

Changes effected by conquest, justly, and unjustly.

Conquest has been said to be a just ground for dis-

solving the separate condition of a state (a); perhaps, because it sometimes occurs that a people, if its members will not consent to its dissolution, is compelled, by the application of just force, to choose the lesser evil of submission to the government of the conqueror, in preference to the rigid enforcement of strict punishment and reparation. But the distinction between just and unjust force applied to the subject, will dispel all doubts. If the latter be used, it can convey no right: if the former, the people must submit to the infliction of the punishment; or they may, to save themselves from the consequences of it, consent that the complaining power shall have the preventive security against future transgression, of governing the transgressing body. But a state has no right to compel an independent body either to dissolve or to abide by their own exclusively-internal compact, to which the interfering power is not a party. Such a pretension of right is one of manifest injustice, and if it were tolerated, there would not be the least security for nations.

To justify, therefore, a governing right by conquest:—

1. The cause of attack must be just.
2. The war must be carried on in a justifiable manner.
3. The surrender of the right of self-government must be positively, and not doubtfully, expressed. If a government be dissolved by unjust force, the citizens are not therefore subject to the conquering power;

(a) See Burlamaq. ii. p. 98.—Turnb. Hein. i. sec. 247, and ii. sec. 113.—Xenoph. de Republ. Athen. cap. i. sec. 14, and cap. iii. sec. 10.—Spav. Puff. ii. p. 343.

free consent being essential to new dominion. From the moment that the people actually surrender their previous form of government, the new system takes complete and lasting effect.

4. The conqueror has no right to the property of the conquered, excepting to make reparation for the damage sustained (a).

XI. A nation may have a kind of subordinate relation to another, without losing its freedom. The relative duties of the metropolitan country, and the province, are few and simple. Of colonies.

It is the duty of the presiding head of government to watch, with affectionate tenderness and wisdom, over the interests of its political offspring. A colony of long standing ought to be enabled to provide its reasonable expenses; and if it raise a sufficient revenue for its own purposes, it should be allowed a control over the money raised by it, so far as it is convenient. And as the amount of its revenue must partly depend upon the freedom of its trade, its commercial intercourse should be as unshackled as the interests of the mother-country will permit. Such are the means by which the evils of a distant government are mitigated.

There is an equal obligation upon the national progeny, not to turn against its public parent, the arm to which its fosterer's nourishment has given strength. It is natural that a parent-country should preserve an authority over its colonies. It is a most ungrateful act, for a race of people to avail itself of valuable external assistance, and, at capricious discretion, to disclaim all obligation.

(a) See Locke on Gov. book ii. sec. 182.

A spoiled political child resembles an over-indulged infant. It will feel its way, by gradual importunities; and will at length attain its perverse ends, perhaps to its own great injury—certainly to the discomfort of the parent.

Ultimate appeal should lie from the inferior dominions of branch-countries to the highest court of appeal of the superior state; in order that judgments disparaging the sovereignty of such state may not be given; and that the law of the inferior country may not be insensibly altered, without the consent of the superior.

CHAPTER X.



OF INTERNATIONAL LAW.

§ I. INTERNATIONAL law is the law of nature applied to independent states, as if they were individuals.

Definition of it.

This definition is, it is hoped, of a much more correct and intelligible character, than many of the laborious definitions of jurists, which seem rather to perplex than to satisfy the mind.

II. It is necessary here still further to enforce the doctrine, that compacts cannot be called laws.

International obligations not laws.

Some very celebrated writers (a) upon international law incline to the doctrine, that the obligations between nations are so many laws made by them. Their view is grounded upon the assumption, that the nations of the world form one federal community, and that the laws which bind them proceed from the common consent of that federality. But the principal countries of the earth do not constitute one social body. They have never met and agreed either to the estab-

(a) Suarez, Grotius, Huber, and Bynkershoek.

ishment of a common legislature, or to the adoption of general laws to bind the whole, and to be carried into effect by the common force. The individual *dicta*, opinions, or practices of particular states, cannot be accounted as laws obligatory upon nations at large.

Nations are in a state of nature with regard to each other, and have no common force. Mere agreements might equally exist, if there were no political body in the world, and men were all reduced to a state of original simplicity. Thus prescription is a right founded upon the common consent of men, implied from silence. It is not the result of civil jurisdiction, or social union. Nations being not one social body, but independent agents, cannot make a law to bind each other. They never yet combined unanimously in the establishment of legal institutions, to which they were to be liable.

If, indeed, these international customs were so many positive laws, it would be the constant and absolute duty of every state to cause reparation to be made for injuries sustained by another civil power, through the wrong of a third nation. But there is no common tribunal cognizant of the violations of the customs of nations. And even what those customs are, is a subject of continued dispute.

Preceding
rules all appli-
cable to this
branch of the
work.

III. The first book, on the laws of nature, and the previous chapters upon civil laws, will therefore be found, in every part, highly applicable to the present subject of enquiry. For it is impossible correctly to judge of the law by which nations are bound with reference to each other, without first being well acquaint-

ed with the principles of natural and civil law, on which international jurisprudence must be essentially founded. The laws of nature teach us the rights and obligations of individuals: and the social law instructs us in the rights and duties of the members of collective bodies. That abstract principles, wholly independent of such two sources of knowledge, can lead us to form a just estimate of the rights of nations, who are, as respects each other, in a state of nature, is an absurdity too palpable to require argumentative observation.

IV. It is a singular fact, that a branch of jurisprudence so important as that which forms the subject of the present chapter, should not have been treated of, by the political philosophers of ancient Greece and Rome, as a specific branch of law. We find, indeed, from their works, that they were not wholly indifferent to the relations and duties existing between states; but still they did not deem the subject to be one deserving of separate and very grave consideration. This doubtless arose, partly from their more contracted views of politics, and partly from the comparatively-limited intercourse which then existed between different nations. It is in candor to be acknowledged, that the increase of population, the establishment of the christian religion, the important revolutions in Europe, the teeming events of the period termed 'the middle-ages,' the discovery of the compass, the invention of gunpowder, the institution of chivalry, the matrimonial alliances of royal families, the discovery of what we call the 'new world,' and the appointment of ambassadors, are events which, since the time of the ancient writers,

Of the history
of international law.

have added greatly to the importance of international law. The increased necessity for its present knowledge, furnishes an extenuating plea in favor of their neglect of it.

Schmauss, in his essay upon natural rights^(a), informs us that the ecclesiastical fathers censured the study of this description of law. The earliest essays upon international jurisprudence, that we know of, appeared in the sixteenth century, and they have nearly all sunk into insignificance. Benedict Winkler, Balthazar Ayala, and Alberigus Gentilis, were the most celebrated authors of them. The last writer is entitled to particular notice. In the seventeenth century, the work of Grotius appeared, bearing the singular title—"Of the rights of war and peace." His discoveries imparted a stimulus to the political, as those of Newton did to the physical world. Since his time, a great number of authors have appeared, several of whom, particularly Zouch, Puffendorf, Leibnitz, Wolf, Moser, and Vattel, have contributed to shed much light upon the present theme. Its study is however neglected in England—a nation whose political knowledge ought to be as liberal as its constitution.

General rules
by which in-
ternational
law may be al-
ways ascer-
tained.

V. As new cases of international controversy are, in the multitude of fortuitous contingencies, continually presenting themselves, it may not be considered inconsistent with the nature of this work, to endeavor to lay down such general rules, as will guide us to the discovery of disputed points; whether specifically treated of, or not, in this chapter. For it is impossi-

(a) Des Rechts dest Natur. pp. 73, 4.

ble for any jurist to contemplate, with minuteness, all possible cases of international claim and obligation.

1. The immutable laws of nature are ever obligatory upon states. States are moral persons: their reciprocal conduct should therefore be, so far as it can, like that of persons to each other in a state of nature. Collective bodies are in a condition of natural liberty, with reference to other countries.

2. They are all, whether large or small, weak or powerful, naturally equal, and independent, in all things; and have a right to send ambassadors to such nations as receive them. The same rules of action therefore apply to them all.

3. States are bound to promote their individual, physical, and moral perfection, to the highest possible degree that is consistent with justice.

4. They are also under an obligation to consult the happiness of each other as much as they can, without neglecting their own advantage. They should therefore benefit each other, as much as possible in peace; and injure each other as little as they can in war. Nations should be peaceful to each other; and, for this purpose, do as they would be done by. If duty towards our own and another nation naturally conflict, we must prefer the former.

5. Between contending or dissenting states, there is no common judge (*a*).

6. Nations are the proper judges of their duty as to themselves, and of their internal disputes; and are entitled to the quiet exercise of such judgment, so long as they do no causeless harm to other countries.

(*a*) See Bynk. Q. J. Publ. lib. ii. c. 24.

They have a continual right to their natural liberty, until they voluntarily surrender it. But they cannot, by any pretended surrender, dissolve their obedience to the ever-continuing laws of nature. All treaties contrary to those laws are therefore void.

7. The use of force against them is justifiable only for a breach of some perfect right. To do to them causeless harm, is unjust. There may then be actions of states morally wrong and indefensible, but which others are bound to suffer, as individuals often are, in a state of nature.

8. Every national violation of moral law, or infraction of the laws of nations, renders the offending state liable to be repressed in its unjust attempts, by any other body politic (a).

9. The choice of a government, at its establishment, is vested in the people which it governs; and when such choice is positively determined, other nations are bound to acknowledge it.

10. Conventions bind only those nations which are parties to them.

11. Every forcible attempt to establish in another nation a particular system of government, religion, or law, is an unlawful opposition to the true interests of countries.

12. Usage, or customary submission, although of a tacit nature, is, if not of a naturally-unlawful character, binding on such states as must rationally be considered parties to it, until they declare their determination not to observe it. All apparently-general internation-

(a) See Vatt. Prelim. sec. 22, and book i. sec. 23, 283.

al customs must be presumed to have been adopted every-where, until the contrary appears.

13. External interferences in the domestic affairs of a state, excepting respectful persuasions, and humane interpositions, are injuries. It is unjust to use force, under the pretence of equitable mediation. Nations should not encourage internal insurrections in other states. But they may restrain wilful and unnatural cruelty and devastation; as if an armed force lay waste houses and corn-fields, and murder old men, women, children, or innocent inhabitants, in order to revenge a supposed wrong.

14. As nations owe to each other the same duties, and enjoy the same rights, as individuals do in a state of nature, they are not obliged to involve themselves in war, on account of the internal or external concerns of each other, if their own rights be not infringed upon; but they may assist a requesting party against a wrongful injury, if not restrained by treaty. States may, and in fact ought, to wage war, for gross infringements upon the liberty of nations in general.

15. Neither are they bound to prefer commerce to agriculture; for that is a matter of discretion, and it is still a subject of doubt whether the former is the more advantageous.

16. If the rights of a member of a state be wrongfully attacked, the state is injured and outraged.

17. The interests of the lesser portion of a nation should always yield to those of the larger. This principle will settle a thousand questions of controversy in states and colonies.

18. The power exercising the rights of sovereignty,

however constituted, is entitled to represent the nation, in international affairs. States are not at liberty to pry into the secrets of their neighbours, in order to discover defects in the titles of the governors.

19. As it would be unjust for a governing power to prefer foreign to native interests; a state is not under an obligation to inflict detriment upon itself, in order to serve another country.

20. Reason, or an enquiry into the fitness of things, is the only true test of disputed international rights and obligations.

To these few and clear general principles, the whole of the comprehensive system of international policy may be reduced. Cases, it must be conceded, sometimes arise, which it is rather difficult to determine. But the difficulty of their decision is no more to be taken as a proof of the impossibility of their determination, than the abstruseness of a mathematical hypothesis is to be received as evidence of the fallibility of mathematics—the most certain science in the world.

Of the equality of nations.

VL. All nations are equal in rights. Neither of them, however large in power, or whatever is its religion, or government, or name of sovereign dignity, is entitled to any precedence not voluntarily given up, over another of them. Their respective sovereigns are therefore equally independent (*a*).

(*a*) See Ward. ii. p. 363 to 465.—Bynk. Q. J. Publ. lib. ii. c. 9.—Vatt. Prelim. 18, & 2. 3. 37.—Jac. Gothofred.—Struvius.—Howel on Preced. 23.—Mackenzie, Laws and Cust. of Nat. as to Preced. 6.—Vie de Grot. par Burigny, 1. 394.—Speed, 646.—Wicquefort de L'Amb. liv. i. sec. 35.—Volt. Esp. des Nat. 3. 208, and 5. 203.—Gibb, Dec. and F. c. 49.—Molby

VII. There is no principle of international law more important for our recollection than this:—that states are moral persons. It is to the ignorance of it, that the rights and obligations of countries are so frequently miscalculated. It teaches us that the reciprocal conduct of states should be, so far as it can, like that of single persons to each other in a condition of nature. It follows from the rule just laid down, that all political bodies are equally independent—that they are in the full possession of their natural rights—that they are the only legitimate judges of their internal administration—that there is no power vested in one nation to dictate to another what shall be its internal or external rule of conduct—that treaties and customs bind none but those who are parties to them—and that it is unjust to attempt to force a particular form of government or religion upon a nation.

Importance of the rule that states are moral persons.

A distinction has been made by the learned professor Von Martens, between sovereign, and what he terms 'demi-sovereign' states. I have avoided the division as being dangerous, and calculated to mislead and confuse us, in our international inquiries. I have treated all nations possessing independent sovereign power, as sovereign states. Of an equally-erroneous

de Jur. Mar. 99.—*Chron. Brompt.* apud Twysden, 864.—*Co. 4 Inst.* 343.—*Lett. de De Witt*, 2. 384.—*Pfeffel. Dr. Publ. Diatriba de Jur. Præcedent.*—*Grot. de J. B. et P.* 2. 5. 21, and 22 and 2. 9. 8.—*Martens. Precis du Droit des Gens.* 1. 155.—*Seld. Tit. of Hon.*—*Thurloe's St. Pap.* 2. 614.—*Mat. Paris*, 19.—*Cæs. de Bel. Gal.* 5. 22.—*Rousset. Supplem.* ii. p. 1.—*Duck. de Author. Jur. Civ.* 2. 1. 4.—*Sir R. Cotton's Abst. as to Engl. and Spain.* *Harl. MSS.*—*Putter. Const. of Germ.* 2. 304.—*Herman. Conringius. Disc. Nov. de Imp. Rom. Germ.*

nature is the division made by Leibnitz and Moser, of sovereign states into great and small states.

Of the independence of nations.

VIII. Every state is equally independent, excepting so far as it has surrendered its freedom. It is therefore in the discretion of the sovereign power to take all precautionary measures for its external safety and internal quiet. But if extraordinary preparations for hostility be made, it is reasonable to answer any public enquiries upon the subject made by an ally. If no reply be given, it must be concluded, either that policy requires the strictest silence, or that the armament is intended to act against the inquiring state.

The promise of Carthage, not to make war without the consent of Rome, was a death-blow to her independence.

Of the general rights of nations.

IX. The original state of communion must be, to a certain extent, still regarded, in determining international rights.

The general international powers as to property, over inexhaustible things, of innocent use, of extreme necessity, of passage, and of foreign residence, will be, in their proper places, hereafter particularly treated of.

To carry off women by force, even for the purpose of perpetuating a nation, is unworthy of being sanctioned by a civilised country (*a*).

Of international contracts.

X. The rights and obligations of nations must be all tried according to the laws of nature. States be-

(*a*) See contra:—Wolff. Jus. Gent. sec. 341.—Vatt. book ii. c. 9.

ing capable, as moral agents, of consenting to treaties, often enter into them for mutual convenience and advantage. But as such compacts are the results of mere reciprocal agreement, and are not the primary laws of nature, they are binding only upon those civil bodies which are express parties to them.

As states have not the power to release each other, or their respective members, from the observance of the laws of nature, they cannot enter into contracts violatory of natural law.

XI. The usage of nations, excepting in such things, if any, as they had all agreed on, could afford no evidence of absolute international laws, made by countries, if it were possible for laws of that kind to exist. But if we explore the voluminous records of facts which History has transmitted to us, we shall find the practice of states to have been different and contradictory. Usage furnishes us with no evidence of the existence of a positive international law; but the presumption arising from its reception, still furnishes a strong motive for its observance, and timely notice should be given before a national custom is abolished. Julius II., impressed with this principle, felt himself bound to use the greatest caution, and to give ample notice, upon the abolition of the privilege of asylum formerly permitted to the ambassadors sent to Rome.

Of international usage, prescription, and usucap-tion.

Customs bind only the nations which have given open or tacit consent to them.

Prescription is as binding upon nations, as on indi-

viduals. Unjust force would be continually resorted to, if usucaption did not justify the retention of rights, against those who have been for a long time quiet, and therefore submissive lookers-on. The possession of a thing, and the right to it, form the natural consummation of property.

Of the necessity for treaties.

XII. Nations could not exist at peace with each other, if it were not for the adoption of public contracts, usually called 'treaties.' For questions of litigation are continually arising between states, as to boundaries of territory, commercial affairs, and various other subjects of dispute, which call for the interposition of public agreements, to restrain recourse to war.

Definitions of treaties, sponsions & conventions.

XIII. A treaty is a national league duly made with a foreign public power.

Sponsions are unauthorised, and therefore invalid, agreements or submissions of kings, or public ministers, who are however mostly to be presumed to possess the power of securing their states from injury, and of agreeing to public pacts.

Temporary leagues are called 'conventions,' 'pactions,' and 'transitory national covenants.'

Of the natures of treaties.

XIV. Treaties are either personal, which expire with the lives of the contractors, or their descendants; or real, which attach to the state. They are also said to be equal or unequal.

They are in effect sometimes immediate, and sometimes executory; and sometimes they partake of both natures.

Mendelson asserts^(a), that the object of treaties is always to convert imperfect obligations into perfect ones. This view presupposes that every league which is made is entered into from the purest motives.

It is not considered necessary to detail the various subjects and forms of treaties.

XV. It is essential to the validity of a national league: 1st, That the matter of it be physically and morally capable of performance. 2dly, That it be made by the sovereign power; so that it shall be binding upon the whole country. 3dly, That the sovereign power have political right to enter into it. 4thly, That it be voluntary. 5thly, That it be of a mutual character.

Of the essentialities of treaties.

States should take care that their contracts are made with the persons having due authority to agree to them.

We can, by treaty, bind ourselves only to what is lawful^(b). Alliances are binding, if otherwise valid, however injurious to either of the parties^(c). Leagues made between sovereign powers are ever binding upon them, notwithstanding the alteration of the form of government, by either contracting party. But if the country pass into the hands of another independent power, the force of a previously-existing treaty naturally ceases.

XVI. Treaties may be entered into with all countries, whatever is their religious faith.

Treaties with infidels binding.

It was formerly held to be disgraceful to treat with

(a) Phædon, p. 219.

(b) See contra:—Grotius and his contemporaries.—Co. 4 Inst. 455.

(c) See contra:—Harrington's Syst. of Politics, c. 8.—Machiavel.

infidels. Grotius, laboring under the but-half-dissipated prejudices of his age, sanctioned the distance to be observed with regard to infidel persons. He even maintained the doctrine, that christian countries were obliged to support the cause of each other against the attacks of infidels, in all cases. Sir Edward Coke, of whom every english lawyer must speak with veneration, lays down (*a*) the principle, that a treaty of mutual assistance cannot be made with an infidel. This doctrine is not founded upon reason, or upon a proper consideration of the nature and objects of treaties. A more liberal spirit now prevails, and the extraordinary notion is negatived by modern international practice. I may take upon myself, even in humble opposition to the very learned chief-justice, to deny that his *dictum* is now the law of England, and I think that I may add, of any other civilised state.

Of verbal
treaties.

XVII. Verbal treaties may be made; but it is obviously safer to reduce national contracts into writing. Neyron, in his dissertation upon the force of treaties (*b*), maintains that verbal international pacts, not reduced into writing and signed, are non-obligatory. This reasoning is contrary to that good faith which should actuate the breasts of sovereigns.

Of the ratifi-
cation of treat-
ties.

XVIII. Although the general rule exists, that the acts of representatives with plenary powers shall be binding upon the principals, yet public convenience has given rise to the practice of requiring a confirmation, even of treaties signed by plenipotentiaries. This ratification, however formal, is necessary,

(*a*) 4 Inst. 155.

(*b*) De vi fœderum speciatim de oblig.

unless the high contracting power do not usually require such form of confirmation, or expressly declare it to be unnecessary. It is now generally judiciously stipulated in most treaties, that a ratification shall be requisite. Princes should not renounce plenipoten-tiary-contracts, unless the ministers have exceeded their instructions.

XIX. The peace of nations must, in a great measure, depend upon the strict observance of their treaties. The ancients observed solemn ceremonies in their federal acts (*a*). It would have been well, if they had adhered to them as solemnly as they enacted them. Some of the treaties of modern times are worded with a solemnity of expression, unsuited to the carelessness with which they are regarded. It ill suits the kingly character, wilfully to break such solemn undertakings.

Of the obligation and observance of treaties.

Many were the instances in which the Romans did not observe that good faith in their national transactions, without which a state cannot be truly noble. Valerius Maximus (*b*), records the disgraceful fact that Quintus Fabius Labeo, having by treaty stipulated, upon the defeat of Antiochus, for the surrender of one half of his fleet, the roman general deprived him of the use of the whole of that fleet, by cutting all his enemy's galleys into halves, and satisfied himself with the pretended justice of appropriating to himself one share of the unnavigable half-ships, and restoring to his antagonist the other.

(*a*) See Hom. Il. ii. 3.—Herodot. lib. i. sec. 74, and lib. iv. sec. 70.—Virg. *Æneid*. lib. vii. 467, and note thereon, and lib. xii. 170 and 316.—Livy, i. 24.—Civil and Natur. Hist. of Siam.

(*b*) L. vii. c. 3.

Of the interpretation of treaties.

XX. Treaties should be interpreted by just rules, and by analogy. The principles observed in the interpretation of civil laws, will guide our inquiries upon this subject. In doubtful cases, that sense is to be taken which impartially consults the interests of each party, and has regard to the rights of nations at large. Treaties should be construed by reason and fairness, not by chicanery. Things not thought of in a treaty, are not to be comprehended in its construction; and *vice versa*. In the case of contradictory treaties, the preference should be given to the prior treaty, if it have not become obsolete by clear disuse, mutual abandonment, or reciprocal infraction. If by a treaty 'innocent articles of freight' be protected against forfeiture, naval and military stores must, as to such treaty, be considered of a contraband kind; and therefore unprotected. As all treaties must be justly decided, we are not bound to observe a league unjust in its end.

Of void treaties.

XXI. Treaties obtained by fraud or unjust terror, are void. Leagues to establish, in foreign countries, particular forms of government, unjust and unreasonable treaties, and those which infringe upon the individual or collective liberty of nations, are contrary to their rights, and void. As monarchs cannot morally agree to acts destructive of the just claims of their subjects, all alliances which tend to support tyranny or unlawful exercise of power by force, are invalid.

No nation has a right to dictate a particular course of conduct to other countries. Every attempt to carry such an illegal compact into effect, is a just cause of war, on the part of any other nation. National

pacts are by no means void, upon the ground of their originating in the war. A nation in really-imminent danger, is, for the time, exonerated from aiding a power which it is allied to by a treaty of assistance (a). A nation cannot lawfully release itself from an alliance, by subjection to another power.

XXII. The object of a treaty of peace is, to conclude all controversies. It puts to rest every disputed point of possession arising out of the war; but rather discourages than obliterates other controverted claims.

Of treaties of peace.

In the drawing up of treaties of peace, the greatest care as to clear expression should be taken upon the following points:—

1. The full re-establishment of amity.
2. The cessation of hostilities so soon as is practicable.
3. The determination of all martial contributions.
4. The release of the prisoners of war.
5. The general amnesty, if the case be such as to require it.
6. The particular terms of peace, as to concessions of all kinds, to be made upon either side.
7. The exchange of ratifications at as early a period as is convenient.

Separate articles, as they are termed, are sometimes added to a pacific treaty, saving or containing a *salvo* about ceremonial points, as precedence, titles, and the language in which the treaty is worded.

Treaties of peace should be made public, unless they contain some necessarily-private articles, in order

(a) See Aul. Gell. Noct. Attic. 2. 29.—Turnb. Hein. ii. sec. 213.

that the subjects may not have an excuse for transgressing against them.

Royal agreements not treaties.

XXIII. It will be perceived from the definition of treaties, that agreements made by princes regnant with private persons, or entered into by such princes as mere individuals, and not in their sovereign capacity, are not classed among treaties.

The mere naming of the high contracting parties, does not prove the alliance to be personal (*a*).

Of the supposed eternal authority against an enemy.

XXIV. The erroneous doctrine of eternal authority against an enemy, even after treaty, or capitulation, is founded upon an untrue (*b*) view of human nature, and upon a gross misapprehension of the legitimate objects of war.

Of state-language.

XXV. The subject of state-language is one which has often given rise to difficulty and dispute. De Real states a fact, which even upon the assertion of so respectable a writer, I can scarcely credit, that the Turks do not consider a treaty obligatory which is not worded in their own language. Subsequently to the revival of letters, and until the peace of Nimeguen, the latin tongue was generally used by the nations of Europe, in their public writings; but since that peace the latin has, in a great measure, given way to the french. The reader will perceive that so far as concerns the obligation of treaties, it is by no means important in what particular tongues they are worded. It is sufficient that they express, in intelligible words,

(*a*) See Pedius.—Ulpian.—Dig. lib. ii. tit. 14, de Pactis.

(*b*) See contra:—Hobbes.

the intentions of the parties. But two contracting nations may fairly require a copy of the treaty entered into by them, to be drawn in each of their languages, and may properly resist any dictation or superiority claimed by one of them, as to the language of the treaty. It is often for the saving of disputes agreed that the language, style, or ceremony adopted, is not to be considered as a precedent, but is used without prejudice to the respective rights of the parties.

XXVI. A protocol is a term used to express an original copy of a national agreement. The original is sometimes miscalled by that term. Of protocols.

XXVII. He who exercises imperial prerogative, is a sovereign, equal to other kings, whatever may be his or their title. He enjoys regal dignity. It is not the shape of a crown, or the value of its jewels, or the formal style (*a*) attached to a name, or the size of a dominion, or the large extent of political power, which constitutes sovereignty. Monarchs cannot confer royalty. Of the international rights and privileges of sovereigns.

Monarchs represent their people upon all public occasions.

XXVIII. Monarchs should conduct themselves with dignity and justice towards their kingly brothers, complacently endeavoring to excite affection and respect. They are, like the nation, bound by the treat- Of the international duties of sovereigns.

(*a*) See Ans. of Louis XV. to Min. of Cath. II. Jan. 18, 1763.

the forms of ceremony is optional: but is sometimes observed with peculiar nicety.

It is by the same custom to announce to foreign powers the accession of a king. This custom obliging almost all the royal antagonists, as the notification is of the nature of international necessity. It was agreed by treaty that the queen of Sweden, in 1719, when she married with Peter L., notified to him her accession. In an excess of politeness, he considered it his duty to come to congratulate her upon the event. The ceremony observed in this ceremonial should be of a moderate kind, suited to the circumstances. If it be observed by the communicators of the royal message, it may be remanded.

The history of european nations furnishes some extraordinary instances of the civility of crowned heads. Louis XIV. put on mourning upon the death of Leopold and Joseph, with whom he was at war. Charles VI. did the same upon the decease of Louis XIV. Louis XV. when at war with England, congratulated George III. upon his marriage.

XXI. Upon the arrival of a foreign king, the proper marks of friendship are, to salute him with military honors, to yield to him precedence, to leave off mourning during his stay, to cause public rejoicings, to make presents to him, to command national prayers for him, to provide for him a suitable residence, and to defray the expenses attending his sojourn. One, or more, or all of these marks of attention may be shown, according to circumstances.

The heavy expense, and punctilious ceremony of regal visits, have given rise to the custom of travelling

Of the honor due to a foreign king on his arrival.

ties of their ancestors, if made for the public, or for themselves and their heirs or successors.

A king should prefer things to names. Real courage is the determination to pursue virtue undauntedly. The force of the community, which is centred in the king, should be directed only to good objects. An august sovereign will not be the less zealous in his patriotic and enlarged pursuits, because his efforts are sometimes unrewarded or condemned. The self-conviction of a good prince is his best recompense. A monarch who, in all his acts, disinterestedly and prudently considers the public interest, without neglecting the just demands of other nations, is above all esteem.

An absolute monarch may, upon reasonable grounds, revoke his own donations and immunities. A public creditor using proper precautions, and advancing to the sovereign, money which he had good reason to believe was to be applied to the public service, should be publicly indemnified, however the amount has been misappropriated.

Of international ceremonies as to sovereign powers.

XXIX. The usual marks of politeness and friendship should be carefully observed between all sovereign powers. The breach of them being, however, only the infraction of an imperfect right, is not a sufficient cause for war.

Of royal notifications.

XXX. Compliance with custom requires that the ordinary notifications of public events, and observance of court-mourning, should be attended to, by civilised allied sovereigns, with regard to each other. Between

enemies, the practice is optional; but is sometimes observed with a singular nicety.

It is particularly customary to announce to foreign monarchs the accession of a king. This custom obtains between royal antagonists, as the notification is considered a subject of international necessity. It was upon this ground that the queen of Sweden, in 1719, whilst at war with Peter L., notified to him her accession, and, with an excess of politeness, he considered it not unbecoming to congratulate her upon the event. The form observed in this ceremonial should be of a respectful kind, suited to the circumstances. If it be otherwise, the communicators of the royal message may reasonably be remanded.

The history of european nations furnishes some extraordinary instances of the civility of crowned adversaries. Louis XIV. put on mourning upon the deaths of Leopold and Joseph, with whom he was at war; and Charles VI. did the same upon the decease of Louis XIV. Louis XV. when at war with England, congratulated George III. upon his marriage.

XXXI. Upon the arrival of a foreign king, the proper marks of friendship are, to salute him with military honors, to yield to him precedence, to leave off mourning during his stay, to cause public rejoicings, to make presents to him, to command national prayers for him, to provide for him a suitable residence, and to pay the expenses attending his sojourn. One, or more, or all of these marks of attention may be shown, according to circumstances.

Of the honor due to a foreign king on his arrival.

The heavy expense, and punctilious ceremony of regal visits, have given rise to the custom of travelling

incognito. In the latter case, respectful attention only is requisite. Peter I. had no just cause to blame the swedish king for not treating him with royal distinctions, when he travelled through Riga *incog*.

In war, princes should be courteous to each other, as the contest is not between them personally.

Of libels upon
foreign sove-
reigns.

XXXII. As it is essential to international amity, to preserve the reputation of foreign monarchs and states, it is not only a right, but it is also a duty of the public power, to take care that no wilful and unjustifiable attack upon their honor be made by any of the subjects.

If the people were permitted at pleasure to vilify the person or the country of a foreign ally, it would furnish continual cause for national irritation.

But, tender as a virtuous sovereign will be of the reputation of his allies, he will not exceed the limits of internal political freedom, and punish a subject in a mode contrary to reason. And he cannot, at the utmost, inflict a punishment which could not have been enforced, if the act had been directed against himself or his subjects. In some cases, the offence cannot be considered in so strong a light as if relating to his own country, there being no allegiance due from the subject to the foreign sovereign.

Of royal pre-
cedence.

XXXIII. Very many have been the questions as to royal and princely precedence, which have puzzled the heads of continental jurists. Many, too, have been the national contests upon the subject. Nice points have been started at different periods, relative to the precedence of sovereigns, on account of their com-

paratively-superior antiquity of titles, power in their territories, extent of country, grandeur of dignities, number of titles, imperialism of crowns, and attachment to christianity. I am bound to say, that universal law knows no such distinctions, and that all independent sovereigns are upon an exactly-equal footing, until, by treaty, or voluntary compliance with custom, they waive their right of equality.

It is proper however to state, that where disputes respecting precedence arise, the following means may be adopted, in order to prevent an interruption of friendship, or a delay of public business:—

1. To adopt the rule of alternation; so that each may alternately take the lead.
2. To observe an exact equality, by some plain or ingenious mode.
3. To appear *incognito*.
4. To be absent, so that the question may be avoided.
5. To submit with a protest.
6. To agree that the submission made shall not operate as a precedent.

No rule to prevent disputes as to imperial precedence is more equitable, than that sovereigns shall take the lead according to their seniority of kingship.

XXXIV. The titles of ‘ emperor,’ and ‘ king,’ are accounted the most dignified. But the name of the dignity under which a royal individual governs a territory, is immaterial. His sovereign independence of power is not vitiated by the modesty of his title.

Of royal titles.

Of the exterritoriality of sovereigns.

XXXV. The exterritoriality of sovereign princes, that is, their exemption from civil and criminal jurisdiction, is justly (a) founded upon the elevated nature of their offices, it being considered that, to a certain degree, they are sovereign every-where.

Of the inviolability of sovereigns.

XXXVI. From the exterritoriality of monarchs results their exemption from the legal jurisdiction, when in a foreign country.

Even a sovereign may however be treated as an enemy, and if exercising open and unjustifiable violence against the foreign state, may be, for the protection of it, warned to depart, imprisoned, or killed.

An alien-sovereign cannot commit treason, or anti-municipal crimes, in a country in which he is temporarily resident.

A governing prince, detained by right of war, and continuously treated as an enemy, may, upon conspiring against his conqueror's life, be put to death.

Of royal marriages.

XXXVII. The refusal of a royal lady to marry a sovereign or prince, should not be treated as an act of hostility. To take away the right of matrimonial choice, is to cut off an essential part of the freedom of nature.

Of navigation laws, as affecting kings.

XXXVIII. Navigation-laws affecting all other subjects, do not bind the king, whilst acting as the trustee of the public. Such laws must generally be pre-

(a) See Aitzema, Saaken van Staeten Oorlogh. c. 34.—Von Martens, book v.—Bynk. de For. Leg. c. 3, 4.—Strube, Rechtliche Bedenken. iii. p. 51.

sumed to save the public rights vested in the king, and he cannot forfeit a fine to himself^(a).

XXXIX. It is usual to exempt the moveables of a monarch, and his family, from public duties of every kind, upon request. But such part of his property as is immoveable, or stationary, in a foreign state, is subject to the national jurisdiction, and its seizure must be treated as a reprisal.

Of royal property in a foreign state.

XL. The manifestoes of sovereigns should be observed with impartial, unswerving, and dignified fidelity. Monarchs, who are the grand depositaries of national rights, should, for no consideration whatever, deviate from the path of good faith.

Of the manifestoes of sovereigns.

Royal manifestoes are listened to with profound attention by mankind. They are expected to be carried into effect, to their very letter. Other nations act upon the reasonable assumption of their entire and faithful observance. To put other countries off their guard, by the public declaration of falsehood, in order to take unjust advantage of the confidence placed in them, is conduct which never can become an illustrious king.

Manifestoes should candidly explain the royal objects. Vattel has dwelt^(b), with admirable stress, upon the importance of their being expressed in those terms of moderation and forbearance, which contribute to reciprocal goodwill.

(a) See 3 Atk. 141.—5 Co. Inst. 14.—1 Salkeld, 162.

(b) Book iii. c. 4.

Of royal gifts
to foreigners.

XLI. A subject may receive tokens of remembrance from foreign sovereigns, for acts done consistently with his duty to his own state.

Of a deposed
sovereign.

XLII. An unfortunate prince who has been deposed by the great body of the nation, cannot claim of an ally perpetual assistance (*a*) against his deponents; for the treaty or agreement of alliance was made, not with the individual, but with the state.

Of the necessity
for embassadors.

XLIII. It being necessary for the mutual understanding of nations, during peace, that there should be ambassadors (*b*), most nations have, from a very remote period (*c*), wisely consented to depute them. The inconveniences attending royal correspondence, and the absence of sovereigns, have principally given rise to representative ministers.

Of those who
have a right
to send representative
ministers.

XLIV. Every political society on earth, having a right to treat, in its own name, with foreign powers, has also a right to send ambassadors to those countries in which they are usually received: and it is, in its turn, under an imperfect obligation to receive them.

(*a*) Case of James II., and pretended James III. of England with Louis XIV.

(*b*) See Philip de Commines.—Moser. Versuch. v. 3, 4.—De Sarraz de Franquenay, le Min. Pub.—De Cuniga.—C. G. Ahnert. Lehrbegriff der Wissenschaften.—Conradi Bruni. lib. v. De Legat. Cer.—Von Roëmer. Versuch. Einer.—Meister. Bibl. Jur. Natur. *Legatus*.—Ompfeda. Litteratur. v. ii. 537.—Paccasi. Einleit in die Gesandtschaftsrechte.—Uhlich. Le Dr. des Amb.—De Real. Science du Gouv.

(*c*) See Herodot. lib. i. sec. 21, 22, and vii. sec. 152, 157.—Virg. *Æneid*. lib. vii. 153.

The sending of an ambassador is therefore evidence of sovereignty. They are not of natural right. But the custom of deputing them is now so generally established, and found to be so highly politic, that it may be considered as an affront, for a state which generally appoints ambassadors, not to depute them to a particular nation. If the ambassador's master be a king *de facto*, he is entitled to be recognized in his ministerial character. It is not for the other state rigidly to investigate his master's title, although to some extent such an investigation is just. A sovereign power actually exercising the legislative and executive functions of government, in whomsoever that power is vested, is entitled to send an ambassador; but a faction merely aiming to acquire the sovereign power, is not (a) so entitled.

Dependent princes, viceroys, governors, and ministers, have no right of themselves to depute ambassadors, but they may do so under the authority of their sovereigns. A deputy cannot, of his own mere will, appoint a deputy.

XLV. As it would be extremely unreasonable to force upon a nation an ambassador of an obviously-unfit character, there is a power vested in every state, to refuse to receive in that capacity, either a person who is incompetent to perform the office, or one who has no regard for the dignity of the supreme power to which he is commissioned.

Of the persons
proper to be
ambassadors.

(a) See Volt. Chas. XII. book ii.—Villeroi's Answ. to Presid. Jeannin. 8th Apr. 1698.

Thus, if the person deputed be of unsound mind, or be tainted with moral ignominy, or be disagreeable to the foreign king (*a*), he may justly be remanded to the commissioning sovereign. And those who have grossly abused the majesty of the power to which they are sent, without having made such reparation as has been in their power, are unqualified. I trust that I shall not subject myself to the charge of the slightest want of respect for the tender sex, in opposing the over-gallant notion of Bynkershoek, that females are, to the full, as fit for filling the ambassadorial office as men. The ladies themselves would, I imagine, be scarcely desirous of the members of their sex thus officiating. A woman is, in general, an improper person to be sent as ambassador, at the least to a king's court (*b*), and may therefore, from the reason of the case, be, in the first instance, objected to, by the sovereign to whom she is deputed. But if she have been once received by him, he cannot afterwards allege her sex as a disqualification. There may be, it is acknowledged, extraordinary cases, in which the ambassadorial appointment of females is justifiable. But this fact is exceptive rather than probative. Candor obliges me to add, that the principle which I am disputing, is supported by several historical instances (*c*),

(*a*) See Moser. *Zusatze*, iii. p. 1192.—Schlotzer. *Staatsanzeigen*. book iv. p. 458.

(*b*) See contra :—Bynk. lib. i. c. 5.—Acqua sur la superiorité intellectuelle de la Femme.—F. C. Moser. *Die Gesandtin*. Nach. iii. n. 2.

(*c*) Instances of Marshal Geuebriant's wife, in 1645; Margaret of Austria, in 1508 and 1529; and Louisa of Savoy, embassadresses: and Countess de Koenigsmark, *Chargée des affaires* of Augustus king of Poland to Charles XII.

with how much propriety, I must leave the reader to judge.

The same individual may be deputed to attend different courts, although such form of appointment is generally inconvenient. A sovereign is not bound to receive an ambassador without credentials or mandate-patents, which should be delivered and received as soon as possible after his arrival.

XLVI. An ambassador is entitled to the style of 'excellency,' from all persons, excepting the sovereign to whom he is addressed. Upon this ground the roman cardinals decline to bestow this title upon an ambassador sent to Rome during the interregnum existing upon the death of a pope, considering themselves the temporary depositaries of the sovereign power: an opinion which does not appear to be conclusive.

Of the style, ceremonies, and audience of ambassadors.

It is sufficient for nations to pay to ambassadors, as to kings, such homage and ceremonies as their customs sanction. The degree of honor shown should not, however, be capriciously lessened by a particular power.

The public entries of ambassadors, formerly practised, are nearly discontinued.

It is proper for the ambassador, instantly upon his arrival in the foreign territory, to send an exact copy of his mandate-patent to the secretary of state, or other proper officer, and to request a royal audience thereon. A reply should then be sent to him, appointing a day for the purpose.

In Europe, if a public audience take place, he is, on the day named, according to the custom of the court,

conducted with all reasonable honors, accompanied by the chief members of his retinue, to the king, who sits in his presence-chamber uncovered, and is attended by his ministers of state. He advances towards the sovereign, and bows, uncovered, three times. The king then puts on his own hat, and by sign or speech desires the ambassador to be covered. The minister puts on his hat, and makes a polite speech, afterwards delivering the letters of credence, which he takes from one of his retinue, to the prince, or to one of his ministers beside him. After this ceremony, it is customary for the king to introduce him to the queen, and the rest of the royal family. Private audiences are now the more general in Europe.

But whilst I deem it right to state what the european practice is—a practice somewhat regulated by treaties, I must not be understood to lay down any particular form as absolutely essential. All due respect should be observed, as well by the sovereign addressed, as by the ambassador. Much depends upon the ceremonial of the country to which the ambassador is sent; some deference too may well be paid to the customs and expectations of the nation deputing him.

It is usual for an ambassador, after his royal audience, to send a card of notification of his arrival to those of other states, upon which he receives their visits. Amongst ambassadors, as among equal inferior ministers, the precedence is yielded to the visitant.

Des Callieres has, in his celebrated work upon the manner of negotiating with sovereigns, mentioned a number of nice points of etiquette to be observed by

ambassadors, envoys, and ministers of the third order, which, although they have given rise to many disputes between them, I do not think it important to particularise.

XLVII. Ambassadors, and kingly representatives of every kind, take precedence according to the dignity of their sovereign. They give way to the princes of the blood only.

Of ambassadorial precedence.

An ambassador extraordinary precedes an ordinary one, if both come from the same court, and such precedence be agreeable to their sovereign.

Ministers of various grades are sometimes sent, in cases of dispute respecting the comparative precedence of ambassadors of different nations, in order to avoid disagreeable controversy.

XLVIII. Ambassadors are ordinary and extraordinary. Ordinary ambassadors transact the general affairs of their royal masters. Others are extraordinary. Their rights and duties are alike, while their authority lasts. They are always appointed by the sovereign power which they represent.

Ambassadors are ordinary and extraordinary.

XLIX. Letters of credence are signed by the sovereign power. They state the name and rank of the bearer, and the object of the mission, and request the sovereign addressed, to render full credit to the communications which the person deputed shall make upon behalf of his court.

Of letters of credence.

L. The privileges of ambassadors arise from the dignity of the sovereigns by whom they are deputed.

Of the general rights and privileges of ambassadors.

They are nearly all centred in the inviolability of persons and goods.

The general advantage of mankind requires that they shall be protected from all outrage, and causeless inconvenience. The general rule of the freedom of ambassadors from civil restraint is, that while such, they are necessarily as inviolable (*a*) in persons and personal goods in the foreign country as their very sovereigns would be, even during war, or in the case of crimes.

All nations are bound to keep unmolested, ambassadors and envoys, although they come with a hostile message. They have not the least privilege which is not to be traced to the independence of the monarchs whom they represent.

An ambassador and his suite are entitled to all the privileges, rights, and facilities, which are necessary to the objects of the mission.

The absolute right of an ambassador to pass through the country of a monarch to whom he is not addressed, is insisted upon by Vattel. Although no writer upon international law would sanction the unnecessarily wounding either the person or the dignity of an ambassador, yet the position of that learned author is inconsistent with his own view of the inviolability of territory attaching to every nation.

An ambassador's papers should not be seized, unless they be directly opposed to the state in which he is commorant; and then only if the seizure be necessary

(*a*) See 3 Bulstr. 27.—Montesq. *Esp. d. L.* 26. 21.—Fost. 188.—Turnb. Hein. ii. sec. 220.—Bynk. de For. Leg. c. 5 and 7.—Joinville. *Vie de St. Louis*, p. 67.—Jean Hotoman. *Trait de L'Amb.* c. 4.—J. Hoogeveen. *Leg. Orig.*—2 Sam. c. x.—Bl. Com. i.—Burlamaq. ii. c. 15.—Schleusing de Legat.—Laugier. *Hist. D. L. Paix de Belgrade.*—Ward. ii. p. 525.

to its legitimate defence(*a*). He may say, write, or do what he is pleased, so as it is not wilfully hostile to the state.

An ambassador ought not to give up his privileges or rights, for they are his sovereign's. He cannot make a treaty, without the royal authority.

Embassadors are generally allowed to certify the authenticity of documents, for transmission to their own country.

They lose, in consequence of their absence from home, no rights which they would have enjoyed the benefit of had they been present there; for, in the eye of political law, they still remain as individuals in their own nation.

They are as exempt from imposts as their sovereigns would be; but they are not free from the payment of tolls or postages, charged for public improvements or facilities, of the advantage of which they partake. Their extritoriality, in the absence of any stipulations upon the subject, has the effect of exonerating them from direct taxes.

An ambassador has a right to have his head covered before sovereigns; but that right, from motives of gallantry, is not always exercised before crowned ladies.

All ambassadors are entitled to be treated alike. They cannot exercise sovereign power over their own retinue. Embassadorial privileges refer only to the countries to which ambassadors are addressed. They have not a strict right to pass through other countries, without permission, or to claim any immunity therein.

(*a*) See case of Gyllenburg. Tindal. cont. of Rapin, in 1717.

A nation, after declaring its intention beforehand, may refuse the granting of particular privileges to a foreign ambassador, although it is generally impolitic and illiberal to do so. The concession of them depends upon mutual consent, and one nation cannot compel another to break through its customs.

Of the exterritoriality of ambassadors.

LI. The residences of ambassadors, in which term I may include their carriages, are, from their exterritoriality, usually free from the entrance of officers of justice. But as such inviolability exists for the general benefit, it is unwise and wrongful for a minister to screen debtors or ordinary culprits in his official asylum, which is intended for his own security, and not to answer purposes of injustice.

The harbouring of persons reasonably suspected of treasonable designs, is an act so dishonorable and dangerous, as to justify a forcible entry, if a peaceable one be refused.

The marriages of fellow-subjects of an ambassador, in his state-residence, are reputed good.

Of ambassadorial exemption from civil jurisdiction.

LII. The exterritoriality of ambassadors gives rise to their exemption from the civil jurisdiction of the country to which they are sent.

They owe subjection only to the laws of their own nations. They cannot be treated as subjects; but, at the most, only as enemies. Their inviolability commences from the due notification of their authority.

An ambassador's life cannot be taken away, unless in the unavoidable and self-defending opposition of his open and unjust violence. If, for instance, an ambassador should attack the life of a subject, that subject

would be unquestionably justified in defending himself against such unjust violence, even to the extremity of death itself. I believe that it has never been otherwise contended, although some very loose and wire-drawn distinctions have been raised by juriconsults upon the subject.

Nothing but inevitable necessity can justify a minister's arrest. The conduct of the Japanese, in putting to death the ambassador sent to them by the Portuguese, at Macao, with his splendid retinue, has conferred the suspicion of discredit upon their public promises. An ambassador cannot be imprisoned for any act of his sovereign or state. If a war break out, he is at liberty to return in safety to his country. The sacredness attached to his person, prevents his trial in the courts of the country which he is sent to, unless he be a subject of it, or he have waived his privilege, or it be previously stipulated that he shall be so tried, he being invested with the supremacy, independence, and privileges of his royal master. If charged with a weighty offence, he should be sent back to his country, to be tried there. He is not subject to judicial process for any crime, however great, against the laws of the foreign realm.

An ambassador is not liable to the process of a subpoena, because his sovereign would not be so. Little inconvenience occurs from this rule, as cases seldom happen in which ambassadors are necessary witnesses.

Coke, Foster, and Hale, have declared their opinion, that ambassadors may be tried in foreign countries, for offences against the light of nature, such as murder. Grotius is of a contrary opinion. The sound law upon the subject is, not that an ambassador may

commit such a crime with impunity, but that he should be sent home to be tried. He is liable to the jurisdiction of his sovereign, even for acts committed in the foreign country; because, during the whole period of his stay, he has been under the protection of his own state, and is considered as having been within its confines.

The inviolability of ambassadors in foreign territories may occasionally produce trifling injury, which is not however to be placed in competition with the far greater evils which would result from their subjection to arrest, trial, and punishment, in the foreign territory.

A minister's person is, even before his recognition, protected from attack or confinement, unless he have committed a crime dangerous to the state; and then he may be imprisoned only during the time of danger—a kind of imprisonment to which the english queen, Elizabeth, subjected the ambassador of Philip II. It is always better, if possible, to remand the ambassador to the tribunal of his nation, to answer for whatever offence he has committed.

Of the chapels of ambassadors.

LIII. An ambassador should be allowed, with his retinue, freely and openly to exercise his religion, so long as the embassy lasts; but he is not at liberty to adopt modes of worship unnecessarily offensive to the state. He cannot require that the subjects of the country in which he is, shall be allowed to attend his chapel.

The marriage of fellow-natives of the ambassador, or of any of his suite, in his ambassadorial chapel, is valid; but not of other persons.

LIV. The professed right of franchise, by which ambassadors claim to exempt the neighbourhood from civil jurisdiction (*a*), by exhibiting upon their residences the armorial ensigns of their sovereigns, is not justly claimable. It gave rise to great dispute between Louis XIV. and Innocent XI. The practice formerly existed to a great extent. It is not now entirely abolished, but it is unreasonable, and therefore not obligatory.

Their claim
of franchise
void.

LV. There are less important privileges possessed by ambassadors, such as being saluted with military honors, attending court upon all ceremonial days, having suitable places apportioned to them upon public occasions, driving a coach and six, and hanging up a canopy or throne in their houses; which it is not necessary to enlarge upon.

Of the minor
privileges of
ambassadors.

LVI. Ambassadors and plenipotentiaries are bound to support, upon every possible occasion, the dignity, power, and will of their royal masters. They are but the mirror of the sovereign's power, glory, and judgment, and are not at liberty to act merely according to their own discretion. They must not accept bribes, or private gifts of any kind; but should act honestly, and to the best of their discretion. They should adopt, as nearly as they can with propriety, the conduct which their monarchs would observe if they were personally present; and therefore should not follow the forms of mere private life. Thus they do not wear mourning, upon the decease of a nearest relative.

Of the duties
of embassa-
dors.

(*a*) See Schot. Jurist. Woch.—Khevenhuller. Annal. iv. p. 1340.—Lau-
gier, Hist. D. L. Paix de Belgrade, i.—Schmauss. Corp. Jur. Gent. i. p. 1069.

Of the general
duties and re-
sponsibility of
ministers.

LVII. Ministers are bound to follow their instructions, but to attend strictly to the laws of nations. They should give information to their sovereigns of all that, under circumstances, it is proper for them to know. They have no right to interrupt the authority of the sovereign in whose state they are, or to protect criminals or debtors. They are bound to leave the country to which they are sent, upon a declaration of war, or reasonable notice. They are liable to be tried at home, for any act done there, or abroad; as when away they are supposed to be protected by their own civil power.

Of the quali-
fications of
ambassadors.

LVIII. Ambassadors should be dexterous, but not artful (*a*), diligent in the public good, and well acquainted with international law, existing treaties, and the public wants. The public interests also require that they should be strictly obedient to their orders, and respectful towards the state which they are sent to, mingling patience with dignity.

The business of public negotiation requires a sound knowledge of international law, some acquaintance with state-history, a gentlemanly address, and talents sufficient to perform the duties of his office with credit to himself and his sovereign.

Of instruc-
tions to public
ministers.

LIX. Ministers of all kinds are bound not to show their private instructions to the foreign prince, so as to divulge the strict duty of secrecy confided to them.

But there may be cases of urgent necessity, in which

(*a*) See contra:—De La Bruyère. Chap. du Souv. et de la Repub.—Von Martens, book vii. c. 8, sec. 3.

the sovereign has no just cause of displeasure, if the minister show a part of his instructions. I confine this liberty to those very few cases in which the showing of them is honorable to the minister and advantageous to his sovereign.

LX. An ambassador, upon his departure, unless he leave abruptly, generally receives presents, and a regal audience. These regulations depend upon custom.

Of the departure, in general, of ambassadors.

Upon his return, under whatever circumstances, he may demand passports for himself and his train.

LXI. It is not essential to an ambassador's departure, that he shall be recalled. For acting upon the discretion necessarily reposed in him, he may quit the court, if a gross violation of international law have been directed against himself, or the persons of his suite. Or, the king to whom he is addressed may give him an indirect intimation, or an open notice, to leave the country, with which he is bound to comply.

Of an ambassador's departure without recall.

LXII. The reasons for which ambassadors are recalled by their sovereign powers, may be classed in the following order:—

Of the recall of ambassadors.

1. The accomplishment of the purpose of the embassy.

2. The will of the sovereign power, grounded upon some political or private reason, that the minister's appointment shall cease. Upon these occasions of recall, it is usual for the ambassador to request the honor of a royal audience, to take leave, because such motives for his return are not considered disagreeable to the foreign state.

3. The complaint of the state to which the ambassador is sent, of his misconduct.
4. A breach of international law.
5. Resort to retaliation.
6. The breaking out of hostilities.

In the third case, it can scarcely be agreeable to the monarch to receive the valedictory compliments of the personage who has offended him. In the fourth case, it is not unusual to take leave. In the two last events, the minister sometimes, before his recall, receives notice to depart, without taking leave of the sovereign; but it is allowable for the ambassador, whatever is the occasion of his departure, to request a royal audience for the purpose of taking leave, so as he has in view no object of rudeness towards the sovereign.

The audience, in the case of a recall, is sometimes public, sometimes private. The ambassador presents at it the letters of recall, and makes a courteous speech suited to the circumstances of the case. He receives a letter, which, if there be any ground for the royal approbation of his conduct, contains complimentary expressions. The usual or extraordinary presents, and the passports for himself and his train, are then sent to him.

Before his departure, he calls to take leave of the other foreign ministers, in the same form as that in which he notified to them his arrival.

Proper mode
of embassa-
dor's com-
plaint.

LXIII. An ambassador having cause of complaint against the foreign nation, should, if necessary, forthwith protest against the wrong, and immediately apply to his own state for protection.

LXIV. Upon the decease of a sovereign addressed, the functions of the ambassador sent to him cease; but his inviolability continues for a reasonable time.

Of the effect of the decease of sovereigns upon ambassadorial functions.

When a deputing sovereign dies, the ambassador's person continues inviolable during a reasonable period; and his successor generally sends, with the notification of the event, either a recall, or fresh letters of credence. The latter form is usually adopted in hereditary states.

LXV. The body of an ambassador dying in a foreign country, should be honorably interred, according to his nearest relative's or chief officer's wish; or else sent home with respect, and without the payment of ecclesiastical or other dues.

Of the decease of an ambassador

Court-mourning does not occur upon an ambassador's decease. His effects and papers should be, immediately upon his death, sealed up by his chief officer, and protected by the public power.

LXVI. The suite of an ambassador, in which term I include the secretaries, chancellor, interpreters, clerks, gentlemen, pages, and servants, may be tried for criminal offences (a), but, in other respects, their personal inviolability is generally agreed upon.

Of the suite of an ambassador.

The deputing sovereign may, with propriety, express how far it is his will that the ambassadorial suite shall be amenable to him, or to his ambassador, for offences committed in the foreign state. But the latter is not imperatively bound by that will, although it should be treated with as much submission as the na-

(a) See contra:—Ward, ii. p. 540.—Willemberg. de Jurisd. Leg.

tional interests will permit. Thus, if an ambassador were to claim an uncontrolled right of criminal jurisdiction over his retinue, and were to attempt to carry it into effect, even as far as the deprivation of life, few states would submit to so extensive an assumption of power.

The ambassador may always exercise the last resort of dismissal, with relation to such of the members of his retinue as are appointed by himself, and misconduct themselves.

The mere unappointed companion of the ambassador has no immunity.

Of the wives
and children
of embassa-
dors.

LXVII. Towards the close of the seventeenth century, the very rational practice commenced of ambassadors being accompanied by their wives. Bynkershoëk records^(a) the ribaldry to which the spanish ambassador was, in 1649, subjected, in consequence of his wife being with him in Holland.

The wife of the ambassador enjoys similar privileges to those of her husband, and ranks above the wives of those who yield in precedence to him; and below the princesses of the blood.

The children of ambassadors have the same rights and privileges as if they were born at home.

Of ministers
of the second
order.

LXVIII. Originally, ambassadors only were deputed; but the ingenuity of statesmen has given birth to several grades of ministers.

Ministers second in order, are ministers plenipotentiary, envoys, and inter-nuncios, who rank next to em-

(a) Du juge compétent des emb. c. 15, § 7.

bassadors. They represent their sovereigns only in such affairs as they are authorised to transact. They take rank after all the royal family. Their letters of credence are sometimes publicly presented to the king, but with little ceremony.

LXIX. Ministers of the third order, are residents, and *chargés des affaires*. They are introduced by letters of credence presented to the minister, or, as is much more seldom the case, to the sovereign, or by the verbal presentation of the departing ambassador, or the state-minister, to the king.

Of ministers of the third order.

In some books I find a distinction attempted to be made between ministers resident, and residents. To me, such distinction is unintelligible, and I therefore take no further notice of it.

LXX. It is essential that ministers of the second and third order be clothed with that inviolability of person which is essential to the performance of their duties.

Ministers of the second & third order inviolable.

LXXI. Ministers charged by sovereigns to negotiate with individuals merely, are called 'commissaries.' They do not represent the common body, and have not the privileges of royal mandataries.

Of commissaries and agents.

Persons employed by a people to treat with a sovereign, are merely agents. They are sometimes dignified with the name of 'deputies.'

LXXII. Ciphers are used in state-correspondence, in order to preserve the secrets of the government.

Of international ciphers.

Ministers are bound not to disclose the ciphers of their courts.

Of consuls.

LXXIII. Consuls are international agents of commerce. They are sometimes allowed to be judges of commercial controversies. Their office may be traced to the home-consuls of the twelfth century (*a*).

The power which they possess over their compatriots, must chiefly depend upon the will of the sovereign by whom they are appointed. But in order to avoid the trouble, delay, and expense of litigation, their fellow-subjects often permit them to exercise what may be called a voluntary jurisdiction.

Their appointments are generally called letters of provision, or letters of recommendation, and are seldom termed credentials.

They are not entitled to ambassadorial immunities. But they have all the rights and privileges essential to the due performance of their offices; and their persons are to be regarded as more inviolable than those of the subjects of the nations in which they are stationed. For they are commissioned by sovereign powers, and are therefore well entitled to public respect and forbearance.

In the absence of any stipulation in the commercial treaties, a consul is subject to the civil jurisdiction of the country to which he is sent (*b*). But it is the more advisable course to send him home to answer any complaint which that country may have against him.

A consul ranks after ministers even of the third or-

(*a*) See Muratori, *antiqu. Ital. med. ævi.*

(*b*) See contra:—Vattel.

der. He is, during the whole period of his stay, accountable to his sovereign, as a subject, for his actions.

It is his duty to preside, with diligence, liberality, and justice, over the commercial affairs of his country, and to render all reasonable aid to such of his fellow-natives as require it.

The mercantile character of a person filling the office of consul is not benefited by his official character. This would be to serve private views, under the profession of forwarding the public good.

LXXIV. Heralds are, as we learn from Lucian^(a), Of heralds. and Herodotus^(b), of very great antiquity. To kill them is considered contrary to the rights of mankind. Alexander sent heralds into Tyre, proposing a peace between the Tyrians and himself. The Tyrians disgraced themselves for ever, by throwing the heralds from the top of the walls into the sea. Heralds came into very high repute in the days of chivalry; for they were the appointed messengers of war, and the officers of chivalric combat.

Their protection of person arises from the circumstance of their not personally being combatants, and from the fact, that they are considered to be necessary instruments in the hands of sovereigns, for transacting the affairs of war and peace.

Trumpeters and drummers are now sometimes employed in the heraldic office, and are in that case as privileged as heralds by occupation.

Heralds have all the liberty necessary for the pro-

(a) Hermotim. 40.

(b) Lib. VII. sec. 133, 134.

per performance of their duties (a). If guilty of a crime they should be sent home for trial.

Of state-messengers.

LXXV. State-messengers are necessary for the peace and prosperity of nations, and are therefore protected from all molestation during peace, upon production of their passports, and announcement of their official character.

Of international interference.

LXXVI. No nation has a right to judge the internal conduct of another power, or sovereign; whilst the government exercises its functions. If, however, the administration of the civil authority be suspended, and either party require the assistance of another country, it is for that country then to decide, whether or not it shall assist the complainant. But the circumstances must be peculiar to justify interference. In this discretionary power, is not included either the sanction of an illegal revolt, or the aid of an unjust sovereign. It is honorable to a state to refrain, so long as it can with dignity, from involving itself in war, on account of matters not affecting its own immediate interests. A nation is amply justified, however, in preventing wilful devastation, and unnatural murder: as, if either party burn the houses and root up the trees as they pass; or kill women, infants, or the impotent.

It is not for sovereign powers to define limits of opinion, or internal action, beyond which other states shall not pass, for this is to subvert the independency of nations, to commit injustice under the excuse of vir-

(a) See contra:—Wicquef. de L'Amb. liv. i. sec. 5.

tue, to set at defiance the general happiness of countries, and to deny that sovereignty which is a most precious attribute of them. If the religion or politics of a country be supposed to be of too lax, or too severe a character, it is not for another power to interfere, by attempting to correct the fancied evil. The Romans too frequently made this a pretext for disturbing the peace of other nations. The exercise of conciliation, persuasion, and acceptable good offices, alone is justifiable.

There is no contract between nations, that they shall be free from error in their opinions and habits of life. The most savage horde, and the most civilised kingdom, are entitled to equal inviolability. One country cannot be lawfully attacked by another, unless for an infraction of those laws which are prescribed between nations in general. The exercise of force against men, for intellectual errors, is unsanctioned by the law of nature; and so, in societies, it is not warranted by international law. But this reasoning applies only to that internal administration, which does not immediately affect external states.

Every independent political body possesses the moral power of advocating the general rights of mankind, as well as to take care of its own preservation. We are not bound to wait until our lives and liberties are attacked, if there be a disposition evident, either by expression or by preparation, to invade them. We are not to wait until our cottages are burned, before we stop the arm of the unjust aggressor. We are not to look calmly on, whilst our neighbours are up to their knees in blood.

But let us beware how we persecute our fellow-creatures. Let us not pretend to be showing mercy, in the exercise of barbarity. The depriving the inca Atahualpa, of life, upon the ground of acts confined to his own dominions, was not the less a murder, because it was inflicted in the name of a sovereign power.

Of international mediation.

LXXVII. Neither has a state the right to assume to itself infallibility of dictation to another power, as to its external differences with a third nation. But in cases of obstinate dispute, it is generous to exercise the amiable office of mediation, and to endeavor to substitute the scales of justice for the sword. The governing principles of civilised countries being similar, it is not probable that the decision will be unjust, if the arbitrating power be not interested in the event. But it is the undoubted right of each disputant to reject the proposed mediation, if it so choose.

A national arbitrator or mediator, in the absence of positive stipulation, is not a guarantee for the performance of what is right. The arbitrator or mediator takes precedence of the disputing powers.

Of international guarantees.

LXXVIII. The extent to which an international guarantee, for the performance of some treaty or convention, shall be liable, in case of its breach, must depend upon the nature of his engagement. He is generally liable at least to assist the injured party in the recovery of the right denied. But if stipulations of a new character be made between the two contracting

parties, subsequently to his entering into the guaranty, his liability ceases.

LXXIX. To him, who, for the sake of truth, can divest himself of general prejudices, it is distressing to contemplate the malign feeling with which religious sects have persecuted each other, forgetting that we are all brethren,—a principle which is necessarily the basis of true religion.

Of the religious rights of a nation.

The massacre of the Jews, in the times of Nero and Vespasian, fills with horror the minds of the merciful. Two millions are said to have been slaughtered, within the space of four years. And since that promiscuous carnage, they have been banished from England by Edward I., from Spain by Ferdinand in 1492, from Portugal by Emanuel, from France by Philip the fair, and from Naples and Sicily by Charles V. It is singular that they afterwards found protection amidst the catholics of Rome, and the mussulmen of Turkey, both of whom are usually reproached with the want of toleration.

A people is accountable to none but God for their religion; and it is unlawful in any measure to constrain a country as to its faith. Persecution is impotent. To convince, is the only sound mode of religious propagation. The tranquillity of nations must not be disturbed by the plausible efforts of the zealous. True piety is not produced by the use of force. Philosophically speaking, there must be in the world one form of religion more true than the other forms. But if the opinion of a sovereign power were to be the test of this truth, and a particular form of religion were allowed, upon

the faith of that test, to be politically enforced in other countries, the Sublime Porte would have an excellent pretext for attempting by open violence to introduce mahommedanism into christian nations.

Of missions-
ries.

LXXX. Missionaries, if convinced of the truth of their faith, whatever it is, may journey to foreign parts; and endeavor to spread their religion, by all pure and peaceful means, unless the state forbid their instruction; in which event they are bound to return home.

Of interna-
tional com-
merce.

LXXXI. The reciprocal use of the various productions of the earth, and the mutual wants of mankind, show the advantage of commerce, and even its necessity (*a*). Freedom of trade is a positive national right. As however it is not demonstrable that commerce is essential to the existence of every nation, it is for each state to determine for itself, whether it will openly favor the growth of commercial interests (*b*). States may regulate their commerce with other powers at their discretion. They may either abridge their trade with other states, or claim the advantages of first occupancy, so as they do not unfairly monopolize. Restrictions upon commercial importation are unwise. By enriching our customers, we are likely to enrich ourselves. The price of commodities generally depends upon two things: the value of the national currency, and the

(*a*) See Bouchaud. Theor. des Traités de Com.—Bachof Ab Echt de eo quod just. est cir. com.—Melon, Essai sur le Com.—Boehmer de Jur. Princ.—Schilter de Jur. Hosp.—Sir W. Temple's Lett. p. 113.—Lord Stowell's Judgm. Rob. Adm. Rep. i. p. 32.

(*b*) See contra:—Vattel.

supply wanted by the consumers. Monopolies may sometimes have a slight operation upon prices, but, in the nature of things, happily it cannot prescribe rules for the observance of the consumers, who will purchase or refrain from purchasing in proportion to the demand which the seller makes.

In time of war, a state may prohibit, either entirely or partially, exportation and importation. At all times, the king should have restraining power as to the exportation of arms and ammunition.

LXXXII. Every country is free to impose such customs or duties upon goods, imported and exported, as, in its discretion, it conceives to be proper. But if the regard for the general convenience of nations do not induce it to be liberal in the imposition of such duties, at least it should beware not to compel foreign countries to resort to retaliation.

Of international customs.

LXXXIII. The institution of posts since the fifteenth century (a) has greatly advanced science and literature, and the general interests of nations. Every facility should therefore be given by sovereigns to the passage of mails in time of peace; and, during war, no obstacles, not essential to the national safety, should be offered to them. The monarch, as the guardian of the public, has the regulation of the post, and should render it as useful to his subjects, and allies, as he can. He is not accountable for losses incurred in the conveyance, unless he insure the safety of the let-

Of posts.

(a) See Reichard, Handbuch. p. 25.—Beust, Von Postregal.—Moser, Kleine Schriften, iv. p. 191.—Wicq. i. sec. 27.

ters and packets sent; but he is bound to use all reasonable means for the security of the communications. Nothing but the safety of the state can excuse the violation of that secrecy which is essential to conveyances by post.

Of the public property, territory, and domain of a nation.

LXXXIV. National disputes frequently occur on the subject of territory. Questions of public domain should therefore be well settled by treaties.

Inviolability of territory is one of the most precious rights of nations. It is not less unjust to attempt to deprive a political body of its land, than it is to rob a private person of his property. Both acts are equally violations of the laws of nature. A state is entitled to the uncontrolled use of the territory which it has acquired a right of property in by appropriation.

The rights of anticipation must always be respected in the use of property of every kind. The world can enjoy no quiet, if first occupancy be disturbed, at the pleasure of individuals or nations. The rules applicable to property, as to individuals, are equally so, as far as they can be, with regard to nations.

The right of territory of a number of men to a tract of land, gained by the act of settlement, and to the defined or definable waters, whether bays, rivers, lakes, creeks, or pools, within it, has been before stated (*b*). The subsequent division of the land into portions, for the proprietorship and use of the different members, vests in them an exclusive property in the parcels, subordinate to such limitations and restrictions, as the

(a) See book i.

common understanding imposes. The property of the nation in the distributed land, being only a right of limiting its disposition, is called 'paramount', and is absolute as against all other persons or bodies. It is for independent states to distribute and regulate their own territory as they choose.

The right of navigators to take possession of some newly-discovered land, by planting a flag, or adopting some other symbol of ownership, followed up by active possession, has been seldom disputed. The principle upon which the validity of such claim is admitted, will extend much further than is generally conceded. By first-occupancy a nation becomes the exclusive and absolute proprietor of the territory, and is entitled to its uncontrolled use and disposition.

A man has a right to the land which he primarily uses for the supply of necessary wants. So it is with nations. The right of pre-acquired territory is inviolable. It is impossible to define the exact quantity of land necessary to each individual, or nation, unless all mankind agree upon it, which is utterly improbable. The fact that the land, at first sight, appears too much for the wants of the people, does not take away the right of territory. What appears too much for an individual or individuals, a nation or nations, at the time of appropriation, does not appear so, when population increases.

The following instances are illustrations of these principles:—

Uncivilised men have a territorial right to the forests and plains, which they hunt over, unless they consent to abandon them. This right is not rendered the less imperative by its having been infringed upon. But other individuals may limit this use to a reason-

able extent; if the territory be vastly more than is necessary, and the settlers be driven by necessity into the territory.—The marquis of Bath has a park of 1,200 acres in Wiltshire. If the population of this country increase ever so much, his lordship has still the same right to his park.—If I go to sea, discover an unappropriated island, 2000 acres in extent, and take possession of it in any manner sufficient to express my intention of claiming the whole of it, no one has a right to disturb me and my descendants in its possession. The right is not to be called into question on account of the supposed superabundance of quantity.—China is an extremely populous country: but its emperor, for the sake of his subjects' convenience, has no right to overstep his territorial limits; and, by force of any kind, take possession of a neighbouring tract of land in actual use.

These propositions will be found, upon the whole, to be just and rational, inducing the least contentions, and protecting the general wants and comforts of mankind. The pretended objection, that if there be not room for population, adjoining land must be forcibly taken possession of, is founded upon an ignorance of the condensibleness of the wants of a population, of which China is a remarkable instance: to which it may be added, that there probably are millions of acres of land in the world, used by wild beasts alone, but applicable to the purposes of men.

Notwithstanding any alteration in the appearance

(a) See Adams's Plea before the supreme court of United States, *Fletcher v. Peck*, Cranch. vi. p. 121.—Hodgson's Lett. from N. Amer. ii. p. 395 to 402.—Amer. State Papers, 1812 to 1815, vol. ix. p. 389 to 425.

of property, it belongs to the original proprietor, so long as it can be identified, and separated from another's.

The assertions of reigning princes, as to their extent of territory, although entitled to respect, are not to be received as infallible (a).

It is scarcely necessary to add, that treaties continually effect important alterations in the disposition of property.

LXXXV. The regulation of the coinage, and the ascertaining and fixing the rate or value of money, is an indisputable prerogative of the sovereign. He has the power to fix the currency, as to payments and receipts of every kind, throughout his dominions. The proper declaration of his will upon the subject, is by royal proclamation.

Of coining considered internationally.

LXXXVI. If a social body voluntarily submit to another nation, the terms of submission must be considered inviolable. The failure of protection upon one side, or the commission of infidelity upon the other, annuls the engagement. Encroachments upon the conditions originally agreed upon, are legitimated by voluntary acquiescence.

Of submission to a foreign power.

LXXXVII. The colonial settlements of a nation are branches or parts of the mother country. The treaties and laws, therefore, which refer to the country generally, affect them, unless they are expressly or impliedly exempted from their operation.

Of colonies.

(a) See Lord Stowell's judgm. *Dodson's Adm. Rep.* p. 339.—*Farrinacius*, lib. ii. tit. 6, quæst. 63, n. 173.

*Of the dis-
memberment
of a nation.*

LXXXVIII. The sovereign is the high depositary of the national rights. If he have received the popular authority to dismember the nation, he may constitutionally do so; although nothing but the most urgent necessity for so hazardous a step, can prove the expediency of its adoption.

The members of the disjointed state are entitled to resume the original rights of nature; and to submit to, or to disclaim the authority of the new government^(a).

*Of inexhaust-
ible things,
innocent use,
and extreme
necessity.*

LXXXIX. The rights over inexhaustible things, of innocent use, and of extreme necessity, exist as much with reference to national bodies, as to individuals in the condition of nature. The same rules and limitations apply to both states of being. It is therefore unnecessary further to explain these subjects.

*Of the rights
of aliens.*

XC. The rules for the regulation of aliens necessarily occupy much of the serious attention of states. The rights of aliens are founded upon the natural equality of men, and upon that duty of sociality, which has been inculcated in the first book. They are, in time of peace, and whilst they obey the laws, inviolable in persons and property.

Foreigners may justly be left by the public law to their natural incapacities as to inheritance and succession; or their inheritance and succession may be subjected to particular conditions, or reservations, by the nation within whose jurisdiction they are. But, in the absence of municipal enactments, they may dispose of

(a) See Declar. of States of Duchy of Burgundy to Charles V.

their property by will; and the claim of escheatage as to such property is void. The disposition of the moveable goods of aliens is subject to the national will.

Aliens may marry any females residing within the state, in the same manner as the subjects, unless they be specially prohibited from doing so.

We should be kind to foreigners, and exercise hospitality towards them, so far as we can without self-injury, of which it is for the state to judge, especially if our people be well received in their country. And having once generally permitted their abode with us, it is unjust to send them back without ample cause. The emperor Claudius, in his oration to the roman senate (*a*), beautifully described the honor and benefit derived by a state, from its generous reception of foreigners.

Nations are frequently prevented from imposing severe burdens upon foreigners, from a fear of retaliation.

XCI. Foreigners have no right to intermeddle with the right of territory of a nation, without its permission; for all the land is exclusively vested in the community, and they cannot justly interfere with the rules of a moral body, to which they do not belong; unless those rules be made the excuse for committing causeless harm.

Of aliens as to territory and land.

They are incapable of inheriting land (*b*), unless enabled by the civil laws to do so.

They may be prevented from entering territories in which they have no natural or civilly-acquired interest,

(*a*) See Cornel. Tacit. Hist. Cæs. lib. XI.

(*b*) See book i.

on the same principle as that by which the law of nature allows proprietors of land to exclude all others from entering upon them. But if by unintentional accident they be forced to seek shelter in ports, or harbors, to inflict upon them the literal legal penalties, is generally an inequitable interpretation of the law; unless they wilfully annoy the natives, or do not conform themselves, for the time, to the municipal regulations. It is desirable that civilised nations should agree not to subject alien-enemies to additional misery, after they have anxiously escaped from the appalling horrors of the storm.

A nation has a right to prefer the interests of its own subjects, to those of foreigners.

Of civil jurisdiction as to aliens.

XCII. Aliens are generally liable, during their stay in the foreign country, or their passage through it, to the operation of the laws administered by the judge of the place. This liability arises from the temporary allegiance, and the natural right to punish for violated moral law. The exemption of foreigners from the civil jurisdiction, would produce great inconveniences.

Foreigners should be protected, as well as punished, according to the law of the state in which they are. Owing to physical or political reasons, their punishment, according to the legal institutions of the strange country, is sometimes of unequal operation; but the inconvenience must exist, as it cannot be cured. There is no injustice in this rule, and its infraction is much more likely to cause evils than its observance.

A subject suffering an injury from a foreigner at sea, which is unterritorial, should be compensated according to the laws of his own country; but in a case of

public punishment, the guilty person should be tried according to the laws of his own nation, unless the offence be such a one as piracy.

But aliens should be judged by their own laws, for acts not done within a foreign territory, or to the people of it. And in the cases of treason and sedition committed abroad, the subjects are liable to the jurisdiction at home.

XCIII. In addition to the liabilities of aliens which have been specifically treated of, there are others which require explication.

Of the liabilities of aliens.

It is the duty of strangers not to intermeddle with the secrets of the state in which they, by favor, reside. The civil power may open letters which are, upon reasonable ground, suspected to contain secret information injurious to the country. But the unsealing of such letters should be entrusted to honest and responsible officers, and they should be sent on with all possible dispatch, when found to be of an innocent character.

Foreigners are bound to leave the strange country instantly after a proclamation of war, unless time for departure be granted to them, by general treaty or particular stipulation. Otherwise they may be detained, with their property, and dealt with as prisoners of war.

Strangers are bound to pay taxes, and perform all the duties naturally resulting to them, from their temporary residence.

XCIV. Sovereigns have no right to confer upon foreigners, or rather foreigners have no right to accept, titles or dignities, contrary to the will of the sovereign whose subjects they are.

Of the bestowing of titles upon foreigners.

It is very unusual for states to prohibit their subjects from accepting foreign titles, unless they be in their actual service. They then usually require previous consent.

Of foreign nobles.

XCV. Nobles have no right to immunities or precedence out of their own country; but it is reasonable that they should be respected, if nobility be agreeable to the foreign customs.

But persons who have been lawfully deprived of any dignity by the civil power from which it originated, must, in other countries, be considered as uninvested with it.

Definition of a man's country.

XCVI. A man's country is ascertained more from his extraction, than from the place of his birth. He derives his rights from his father.

Subjects of the state are:—

1. Citizens, born within the state, or elsewhere, whether upon land, or at sea, of citizen-fathers. 2. Those born in the house of a minister at a foreign court. 3. Such as have, by the force of the laws, acquired a settlement, or legal domicile, in consequence of continued residence. 4. Aliens legally naturalised.

Of national character.

XCVII. The seizure of supposedly-contraband property, in time of war, renders the ascertainment of national character important.

Men generally acquire their national character from the country in which they reside. But in those countries in which a perpetual pale of immiscible exclusion is kept up, it is customary to consider individuals as foreigners in the land in which they are in fact so treated, and to regard them as of the country in whose factory or settlement they congregate.

The possession of the soil impresses upon the proprietor the national character of the place, as to the transportation of the produce; notwithstanding the ever-so-distant residence of the owner.

A man without family connexions in the place of his birth, and residing habitually in another country, is to be considered as domiciled in the latter place, the new habitation divesting him of his national character, so far as the subject of confiscation applies.

Mariners are characterised by the country in the service of which they are engaged, even if they have a wife and family resident in a neutral territory. This exception to the usual rule is established from the necessary construction of the case.

The circumstance of an official person, as a consul, appointing deputies to act in the country to which he is addressed, and who derive their authority from him, is a presumptive fact in favor of the national character of the individual being fixed to such place.

As to ships, in cases in which there is nothing peculiar in the conduct of the vessel, the owner's residence determines the national character of the ship. If a ship be navigated under a foreign pass, her national character is that of the foreign country; and she is liable to condemnation as a vessel of that nation. A ship purchased in a hostile country, habitually engaged, after the commencement of the war, in the trade of it, or employed in forwarding the hostile views of the foreign nation, is to be considered as condemnable as if she belonged to, a native of it (*a*).

(*a*) See Judgm. of Ho. of Lords. Feb. 10, 1785, as to "the Nancy," &c. and Mar. 28, 1795, as to "the Ospray."

A person residing in a foreign country, and engaging in trade there, is to be considered a merchant and native of that place, as to such trade, but not as to trading elsewhere. It is thus that traffic impresses upon a transaction a national character, and supplies the deficiency of that character, as to the personal residences of individuals.

Those who are domiciled in a place do not lose their national character, in consequence of its being by treaty agreed to be ceded; until the full consummation of the executory contract, by actual cession and passing of possession. A person desirous to quit the country, but restrained by a hostile power from departing, retains his national character. International law does not require the performance of impossibilities.

Length of time is a most important ingredient in the domicile of an individual. The going to a country for a mere special purpose, is by no means conclusive against his being domiciled there. His stay in that country, for a long and continuous period, fixes his domicile to the place, although at the time of his arrival, he had no intention of remaining in it. The personal denial of an intention to return is, against the individual, conclusive evidence upon the subject.

Of naturalisation.

XCVIII. A person who has been naturalised at his own request, is generally considered, by all states, as a subject of the country which has bestowed upon him the rights of subjectship, and to be, therefore, always whilst he is in such country, and sometimes whilst he is out of it, liable to the sovereign power. Subjects are occasionally placed in awkward predicaments, from the effects of naturalisation. The possibility of those

predicaments should be well considered, before men apply to a civil power for the privilege of incorporation.

XCIX. The sovereign power has a right to control the acts of the subjects, even whilst out of their own state: as to prevent their trading in particular articles, or with certain nations.

Of the power of sovereigns over subjects abroad.

Subjects may, *a fortiori*, be forbidden by the sovereign power, from remaining in the territories, enlisting into the armies, or insuring the vessels of enemies, and from entering into any commerce with them, or rendering to them any assistance in their hostile projects.

No man is, either by oaths or commands of any kind, discharged from the allegiance due to his country.

C. There is no objection to a subject's fighting in aid of a foreign state, unless against his own nation, from which his allegiance restrains him; or unless his sovereign power forbid him from serving there.

Of fighting out of one's state.

CI. The duty which we labor under, to preserve others, and supply their necessary wants, has been laid down in the first book. In the application of that duty to the affairs of states, we are bound to preserve and assist other nations in all things, without reference to their incidental qualities. This obligation will be more or less exercised according to the degree of power possessed by the assisting country, the degree of want of the people assisted, and the moral goodness of each party.

Of international humanity, and courtesy.

If, in any country, the women be much less in number than the men, it is unnatural by force to debar the

females of another nation from intermarriage with them. As much international assistance should be rendered, as can be afforded without self-neglect. Causeless inhospitality is an injury (*a*) of an imperfect kind. The observance of curtesy to foreigners not only confers upon a nation great credit, but also eventually renders it most valuable services. A civilised country which receives strangers with hospitality, will, sooner or later, be rewarded with a grateful return. It is wicked to invade upon the rights of a nation under pretence of serving it. The deluded Indians of the Bahama islands, allowed themselves to be trepanned into Hispaniola, under the pretence held out to them, that it was the elysium of their deceased ancestors, who, in their paternal fervor, wished them to enjoy their society in the region of the blessed. Foolish was the hope which they entertained. But base were they whose better education taught them the folly of the anticipation, and who yet held out to them the insinuating bait, by which they lost their liberty.

The ancient Grecians, according to the accounts of Aristotle (*b*) and Isocrates (*c*), treated strangers, whom they termed *οἱ βαρβάροι*, with nearly as much severity as wild beasts, as being the next in the order of creation. It was probably upon this principle, that they justified the ill-treatment of the ambassadors of Darius. The *κρυπτία*, or secret law, by which the masters of the slavish helots were allowed to murder them, even whilst obeying their orders, was revolting to humanity. We can scarcely reconcile this irregular and rough

(*a*) See contra:—Ruth. Inst. ii. c. 9.

(*b*) Polit. i. c. 8.

(*c*) Orat. Panathen.

system of politics, with the elegance of grecian refinement—with the co-existence of elevated tragedy, and superior comedy.

The indifference, or rather the hostility shown by the Romans towards foreigners, cannot but surprise us, when we consider their general refinements. The fact is too well recorded to admit of doubt. Nothing can prove it better than the synonymous signification of the word '*hostis*,' which equally denoted the terms 'enemy' and 'alien.' Thus we find it written in their law (a): "*liber homo noster ab eis captus, servus fit, et eorum.*" For a nation to enslave a foreigner upon his merely entering its territory, was an act unworthy of the dignity which we usually attach to the roman name. Cicero, in his offices (b), remarks: "*hostis enim apud majores nostros is dicebatur, quem nunc peregrinum dicimus. Indicant duodecim tabulæ, aut status dies cum hoste. Itemque, adversus hostem æterna auctoritas*"—a doctrine which no one could now entertain, without being accounted an enemy of the human race.

The triumphs of the ancients bore a character of cruelty, which scorned to show compassion to an enemy already depressed by conquest. To exhibit to a gazing, and perhaps to a furious mob, the miseries of fallen greatness—to insult the sharpened feelings of misfortune—to taunt the conquered chief with public exposure, at the moment when he had ceased to become an object of fear, was the triumph and the reward of the roman leaders. It cannot surprise us, that those who could resolutely face the greatest danger in the field, were unable to endure

(a) Dig. L. xlix. tit. 15. l. 3.

(b) Lib. i. c. 12.

this ingenious torture. The children of Persius, whose lips could only utter the expressions of their imbecility and innocence, were carried by their nurses in the train, on the occasion of 'the triumph,' as it was called, of Paulus Emilius (*a*).

Of banish-
ment.

CII. Individuals do not, by banishment, lose the rights of men. They are deprived only of the benefit of social protection. As they have the right to reside in some place, they should be admitted into another territory, if the admission can be granted with physical and moral safety. It is cruel to consign men to perpetual wretchedness, on account of former indiscretions, of which they have repented. What would be our fate, if we were so treated by the great Father of mercies? But natural clemency does not call for, or even justify, the protection of irreclaimable violators of the common order of nations.

Of the sup-
posed distinc-
tion between
exile and ban-
ishment.

CIII. It is not necessary to follow the example of a modern jurist (*b*), in defining the supposed nice distinction between exile and banishment. A man, who to avoid a greater evil, chooses to leave a particular place, without any sentence of a court of law, cannot be politically considered as an exile.

Of tolls pay-
able by aliens.

CIV. The advantages attending public improvements justify the establishment of tolls. Those who enjoy the benefit of them should contribute towards them. It is the duty of the national power to take care that compensatory tolls only shall be imposed.

(*a*) See Plut. in vit. Paul. Emil.

(*b*) Vattel.

It is in its discretion to subject aliens to the tolls, either alone, or to a greater extent than the citizens.

National tolls may be, consistently with benevolence and hospitality, demanded from aliens:—

1. As an acknowledgment of the independence of the country. In this case, they should be of a very small amount.

2. For clearing channels, erecting and keeping up light-houses, or safety-marks, making and repairing canals, sluices, and roads, guarding the coasts against pirates, or robbers, and for other public safeguards or improvements; so as, in their passage, they enjoy the temporary benefit of such works.

3. As a compensation for any loss which it is rationally probable that the nation will sustain in consequence of their use of the territory.

But the demanding tolls at narrow oceanic inlets, or openings from one sea to another, necessarily passed through by subjects of different countries, is unjust, excepting for requisite public works.

CV. Some of the original rights of communion still exist; but in an imperfect form. Amongst these is the power of passage. ^{Of public passage.} Nothing but necessity justifies the refusal of a state to admit the subjects of another country to pass through it. We cannot lawfully forbid the passage of their commodities, essential to human life, unless, by allowing such passage, we should immediately endanger our own political existence.

The inviolability of public territory, which has been before explained, will satisfy the reader, that every state has a right to exclude from its confines, the subjects of other countries. Whether it is reasonable to shut out foreigners, is a question, the determination

of which must be left to the public power. No state has ever yet felt itself justified in declaring war against China, upon the ground of its excluding aliens from its dominions.

If a nation, in a state of peace with another country choose to impose upon its members, either an absolute restriction of entrance or passage, or such pecuniary or personal conditions, as in a great degree amount to an interdict, without any rational reason for doing so, such an exercise of right is so far consistent with the law of nature, that the obstacles cannot be removed by force. Such conduct may be complained of, as an act devoid of benevolence. But it is not a breach of perfect right. And that person or power, who, under the pretence of enforcing an imperfect right, openly violates a perfect one, has no reason on his side.

If we can, without injury or damage to ourselves, allow strangers to pass through our country, and do not thereby forward an unjust cause; we ought, in good feeling, to permit them. And if the war be manifestly just, we should rather favor, than oppose, their passage. The right to exclude them altogether from the territory, necessarily gives a power to prescribe the particular conditions of their admission.

The principle of harmless profit must be very cautiously applied to the passage of foreigners over territories. It is very seldom that they can enter or pass through them, without interfering either with the trade, the prejudices, the comfort, or the interests of the foreign country. And if the civil laws interdict their entrance, the advantage derived from breaking them, must be causeless harm. For, wilfully to in-

fringe upon the internal rules of a social body, is a breach of justice not to be defended. And, as already shown(a), the person possessed of the right, is the party best able to judge, and therefore the proper one to decide, what is, or is not, harmless profit from the thing to which the right exists.

The exclusion of foreign troops and ships of war is highly justifiable, particularly if there be reason to apprehend their hostility.

CVI. The capacious expanse of the ocean is open of the ocean. to the use of the world at large. The sea should be so employed, that all nations may have an equal use of it. It could not be occupied as property, on account of its fluidity and vastness, even if such occupation were otherwise justifiable. The nations which have claimed a maritime empire, do not arrogate to themselves property in the seas which they assume the dominion of. The sea may be used by all mankind, without injury to any, which is not the case with objects of tangible possession. The reasons, therefore, which apply to other things of property, do not apply here.

No nation has a paramount right to the immense waters of the deep. The several nations of the earth have not assented to the dominion of one power over all the seas. The declarations of monarchs(b) do not evidence their exclusive right to the sea. No nation has a right to demand dominion over the sea(c), from mere self-assumed sovereignty; or to

(a) Book i.

(b) Quoted by Selden.

(c) See contra:—Puff.—Selden, de Dom. Mar.—Gen. Treat. of Dom. of Sea, 4to. Lond. without date. Brit. Mus.—Harg. MSS. 327. iv.—Franciscus de Ingenuis.—Borough's Sov. of Brit. Seas.—G. Welwood, de Dom. Mar.

demand of the subjects of another nation, upon such ground only, the lowering of their national flag. The liberty of navigation can, however, be expressly surrendered by treaty. And the ocean may, for a reasonable distance from the coast, as within gun-shot, be, for equitable reasons, appropriated to the state adjacent, as part of its territory; but so as not to commit cruelty upon the victims of tempest, who, by virtue of their still-remaining right of self-protection in extreme necessity, may lawfully insist upon saving themselves. Dominion over the waters of the earth has been unjustly claimed at different times, by distinct civil powers. The right to use the sea, will, at last, be found to originate in the community of it. It is open to all, excepting so far as is essential to the safety of each nation, or as is surrendered by actual treaty. The use of the sea is an imprescriptible right; and may therefore be claimed by every country, after any length of time, or even if it have never had the benefit of it before. Unquestionable acquiescence may, however, in some cases, be evidence of a surrender of the right.

But although exclusive maritime dominion is unreasonable, the great utility of the exclusive right to narrow seas, by far preponderates over the inconvenience sustained by other nations in consequence of it. It would be very injurious to nations for foreigners to pry into the secrets of their fortifications and borders. The national claim to narrow seas should however be well promulgated.

Of rivers, liquid territorial confines, and alluvion.

CVII. A nation has a complete right to its shores, and to the rivers which flow within its boundaries.

A river which intersects two countries, is, as a natural advantage, open to the equal use of both. The middle of a river, dividing two states, is the confine of each; unless either have, by just appropriation, a property in the whole of the water, or rather, a right to the exclusive use of the river, which implies also a right to the land which it covers. Primary appropriation of a territory raises the presumption of taking possession of the river which bounds it, excepting in the case of a river sufficiently broad for the convenience of both territories. Losses of substance, liquid or otherwise, do not alter natural bounds, excepting so far as is unavoidable. If the river leave its channel, its former imaginary confines of territory remain. Isles or islets, otherwise unappropriated, belong to the owner of the water. The forsaken channel of a former river, in justice, should go to the person through whose land the new channel forces itself; if he allow the reasonable use of the river to those who previously enjoyed the navigation of it. Water deviating from its former bed, belongs to the owner of its new one, without paying satisfaction; but the original proprietor has a right to turn it back.

In the case of avulsion or forcible separation of land, and junction of it to that of another, the part carried away, if capable of identification, belongs to the original proprietor; but without prejudice to the claim of the proprietor, whose land is covered by the stranger's.

The river-bed belongs to the owner of the river. Each proprietor may take precautions to protect his own banks; but neither is justified in adopting mea-

sures to injure the opposite bank or the course of the river.

Lakes, if within the territory, belong to the owner of it; but if they be situated between two countries, they must, in default of appropriation, belong equally to each.

The right of alluvion generally vests the natural increase in the proprietor of the land which gains an accession. Land swept away by alluvial process, and forming an island or promontory in the sea, belongs to the territory from which the elements of earth are derived.

Of common
ports.

CVIII. The king only can institute a common port. The safety of the nation establishes the necessity for this rule.

Of sea fisheries.

CIX. The use of inexhaustible fisheries at sea, is not capable of being, by single claim, or collective treaty, reserved to one nation, or more; excepting as to the parties to such treaty.

Of the produce of the beach.

CX. In the use just mentioned, is not included the exhaustible produce of beaches, which, whether consisting of fish, pearls, shells, or other things, belongs to the territory of which such coast is the confine, unless the nation have ever acknowledged the right to it to be common.

Of maritime honors.

CXI. In a state of nature, a man is not at liberty to strike another for want of curtesy. Neither, in a political condition, is a naval commander at liberty to fire into a ship, for want of politeness, whether an ally or not. It is with pain that I reflect upon the mischief,

and even upon the public war which has originated in refusals of maritime salute. This is valuing human life too cheaply.

It is proper, however, that rational curtesy should be observed between nations, as well as between individuals.

It is usual to fire salutes in odd numbers. The honor conferred is measured chiefly by the priority of salute; and, secondly, by the number of guns fired.

Hauling down the flag or pendant, and lowering the top-gallant sails or foretopsail, are equal marks of respect(a). It is customary for merchant-ships to salute vessels of war, and forts, with cannon, flag, and sail.

Many nicer distinctions have been made, and occasionally insisted upon. I shall not tire the reader with stating them, nor will I wound his humanity by recording the modes in which they have been at times enforced.

CXII. Vessels or boats found forsaken upon the high seas, without any persons on board, are derelict, and accrue to the person finding them; or, if the civil law have so directed, to his sovereign, subject to payment of reasonable salvage-money, for the salvor's trouble.

The desertion of a prize-ship by an enemy, after capture, is not evidence of the dereliction, or *animus derelinquendi*, on the part of the previous owner.

(a) See Pestel. Sel. Cap. Juris Gent. Mar.—Khevenhuller. Annales.—Ordin. of Louis XIV. for the Navy.—Rousset. Supplem. au Corps Dipl. v. iii. p. 285.—Engelbrecht de Servit. Jur. Publ. sec. 1. 5.—Dumont. vii. sec. 2. 310.—Von Martens, book iv. c. 1, 4. sec. 15.—Bouchaud. Theorie des Traités de Commerce.—J. Sibrand, De Velorum Submissione.—Bynk. Q. J. Publ. lib. ii. c. 21.

Of capture.

CXIII. Captures are prizes lawfully taken in war. The striking of the colors is the time of *deditio*, or surrender. The exemption of small fishing-vessels from capture, is discretionary. The last captor is considered the lawful seizor. To constitute capture, it is not necessary that the captor should navigate the prize.

Of joint capture.

CXIV. As the courage and hazard of captors should be liberally rewarded, the apportionment of joint capture-money, in the absence of unquestionable co-operation, should not be too widely permitted. The fact of joint capture must be ascertained by the following general tests:—

The intention to take—

Active co-operation, shown by the use of joint force, at the taking—

Co-operation of purpose, agreed on, or directed by the sovereign power, continuously in force up to the time of capture—

Unity of chase—

Assistance or encouragement of the friend, and intimidation of the enemy—

The two parties must have a previous concert and specific knowledge. The claim of joint capture is negated by the commander declining to have any concern with the prize. No antecedent or subsequent services, independent of the capture, will, of themselves, entitle one of the claimants to the advantages of joint-taking. Vessels employed in a joint enterprise, and under the orders of one superior officer, are to be regarded as joint captors.

It is not necessary that vessels, to be jointly entitled, should pursue a parallel course. Unity of operation

is all that is requisite. The circumstance of cruising conjecturally in search, is not evidence to raise the presumption of a vessel's joint capture, if taken. The concealment of the enemy, or the other ship, by fog, darkness, or headlands, will not prevent the benefit of joint capture, if the claimant be in a right direction.

As to king's ships, the being in sight generally raises the presumption of co-operation, because they are then bound to assist. To entitle a privateer to the benefits of joint capture, there must be an active assistance in the taking itself; for as the taking by a privateer is a matter of discretion, the merely being in sight is insufficient. The *onus probandi* lies upon the person claiming to be joint captor.

CXV. Recapture is the lawful taking back, by force, or recapture.
of a prize.

The recaptors are entitled to salvage-money, even if they be non-commissioned individuals. The consent of the sovereign must be presumed in a case of such clear necessity.

CXVI. Restitution is the return of property wrong- Of restitu-
fully seized from an enemy, an ally, a neutral, or sub-
jects. tion.

Restitution does not bar a second seizure by other parties, upon the same or different evidence.

CXVII. Salvage-money is the compensation given Of salvage-
for lawfully saving or recovering property. money.

The proportionate amount allowed, varies in different nations, and must generally depend upon the trouble, hazard, and utility of the service. It is given

in cases of recapture, and of rescue, if effected singly by the captured crew; and also upon occasions of restitution to a neutral.

Salvage-money is allowed, by international law, in respect of property retaken by a power out of its enemy's hands, if condemnable in the maritime courts of the first captor. Those who improperly dispossess the original salvors, are not entitled to salvage-money. Nor is it claimable for acts of pilotage. Human life is regarded by the laws as invaluable. Salvage-money therefore is not recoverable for the saving of human life. But it may legally be demanded for saving a party from the loss of the labor of the persons preserved, or in fact for securing any other certain personal advantage to individuals.

Of rescue.

CXVIII. Rescue is the lawful recovery, by a captured party, of a prize before taken from him.

Sailors may, as individuals, endeavor to rescue their captured vessel; but I am of opinion, that the principle cannot be applied to a commander who has, in the full exercise of his discretion, delivered up his sword.

Rescuers have a lien upon the property rescued, for payment of their salvage-money.

*Of visitation
and search.*

CXIX. The lawfully-commissioned cruisers of a nation at war have a right to board and search all merchant-vessels, upon the seas, in order to ascertain their destinations, and the nature of their cargoes. Treaty can take away this right, but mere force cannot. The forcible contravention of the right of visitation and search, subjects the ship and cargo to confiscation. King's ships are not subject to the exercise of it.

The international policy of this right has been much disputed.

CXX. The king's colors, or colors not easily distinguishable at sea from them, should not be assumed by merchantmen. Of king's colors.

CXXI. The flag and pass of a ship is conclusive evidence of her nation. Of flag and pass.

Those who assume the flag and pass of another country, are not entitled to the benefit of their otherwise national character; and yet their actual character may be averred against them by other persons.

CXXII. Head-money (*a*) is money paid by countries to actual captors, for every man on board a ship taken or destroyed, at the time that the hostile ship is first attacked. Of head-money.

It is due, whether there be resistance or submissive surrender; but not if the ship, guns, and men be all saved, as the object of it is to reward the combatants for the injury done to the other state. In a general engagement, the whole fleet engaged is entitled to share the head-money. It is due, by international law (*b*), for private as well as public ships of war, whether they have a cargo on board, or not.

CXXIII. Convoying ships should not desert their convoy, in pursuit of prizes, or other objects; their immediate duty being the protection of the merchant-ships Of convoys.

(*a*) See Statutes 19 Geo. III. c. 67.—Anne, 1708.—Geo. III. 1805.

(*b*) See Lord Stowell's judgm. Rob. Adm. Rep. i. p. 158, and ii. p. 57.
—Contra:—English Practice. See Rob. Rep. iii. p. 58.

which they accompany. But they may take prizes which they fall in with, consistently with their convoy-duty; and are entitled to the benefit of constructive as well as actual capture.

Salvage-money is due to a convoying ship, upon the recapture of a vessel under her care, unless the capture be fairly ascribed to a neglect of her duty of protection.

A merchant-ship under convoy is liable to visitation and search; and the resistance of one ship to it, is usually regarded as that of the whole convoy.

Of hypothecation.

CXXIV. Hypothecation is the pawning of a ship for necessities, by the master, which may be done in a foreign port. A master may hypothecate his cargo, in a case of extreme necessity, whether for repairs or otherwise. Upon the same principle he may sell his cargo, if likely to perish before it reaches its destination.

The probable benefit of the owners is the discretionary rule of hypothecation.

Of pirates.

CXXV. Pirates, or corsairs, are those who by sea seize and appropriate to themselves private or public property, without lawful sovereign authority.

They are the common enemies of mankind, and are subject to be so considered and treated. They have not the rights of war, and are liable to be punished, as invaders upon the happiness of the world. They may be, and generally are, punished capitally. The mode of punishment must depend upon the judgment of the governing power by which they are taken, considering all the circumstances.

Their unjustly-acquired property may be seized and restored to the lawful owner. Possession of things by pirates does not change property. Cruisers merely seizing property which is contraband according to the laws of their nation, or carrying their prizes into the ports of their country, for the adjudication of the admiralty-courts, are not to be considered piratical.

The african states are not now regarded in law as piratical.

A war of extermination, good as the objects intended by it, *a priori*, are, is, under any circumstances, a measure of horror never to be justified, if those objects can be otherwise attained. If ever such a war were to be vindicated, it would be in the destruction of those inhuman corsairs who scour the seas, without respect to property or life. It is astonishing to observe the supineness with which the european powers allow pirates to infest the ocean. To terminate decisively a practice so odious, is surely a task which would, in its performance, do honor to the nations which concerted it. The Abbé Raynal has well remarked (*a*) that it is only by a combination of the powers of Europe, that the object can be effectually accomplished.

CXXVI. Wreckers, or persons who from a motive of spoliation, seize the wrecks of the unfortunate, are liable to exemplary punishment. Of wreckers.

By the ancient constitutions of Sicily, of the time of Frederic the Second, to steal shipwrecked property, was a capital offence. They however allowed the salvage-money, which is claimable at the present day

(*a*) Hist. Pol. liv. xi.

in most european countries. It appears by one of the laws of Stiernhook (*a*), that all the Swedes were subjected to a tax, which was humanely appropriated to the relief of those who had suffered from the perils of the storm.

The proprietor of the shore is entitled to take charge of shipwrecked property, and is bound to return it to the owner, upon payment of salvage-money, if claimed in reasonable time; which is now usually computed to be a year from the period when the proprietor is made acquainted with the accident. The pretended claim of strand-right, under which the proprietors of shores appropriate to their own use property shipwrecked thereon, is cruel and void. It has been, to the honor of mankind, by degrees nearly abandoned, since the thirteenth century. The sovereign is generally entitled to the custody of wrecks.

Of peace.

CXXVII. The doctrine, that war is the natural condition of mankind, was unworthy of the intellect of the philosopher of Malmesbury (*b*). The fact, that different kinds of animals prey upon each other, is often insisted upon, as an argument to sanction the theory of eternal war. But it is not contended that mankind, or inferior animals of the same species, naturally devour each other.

Peace alone can carry into happy effect the beneficent designs of the eternal God. It is then the duty of political bodies to cultivate an amicable disposition; and to avoid the horrors of external, as well as of intestine, war. To obtain peace, or rather the

(*a*) Ll. Stiernhook, 1. P. 1. c. 9.

(*b*) Hobbes.

peaceful possession of rights, is the only legitimate object of hostility.

When peace is concluded, the proper international relation of friendship immediately takes effect.

It is highly conducive to the cause of general peace, for nations to agree to leave their mutual disputes to arbitration; and to engage that certain acts or injuries shall not justify war (*a*).

In time of peace, it is the duty of the sovereign power to apply itself to the cultivation of the peaceful arts. The improvement of the internal comforts, and external security of the country, should be assiduously consulted. The widening and ornamenting the streets of the metropolis, will sometimes have an extraordinary influence in enlarging the ideas of the people. England is greatly indebted to her present truly-august sovereign, for the many national improvements, of which, in the tranquil season of peace, he has been the royal designer.

CXXVIII. Nations sometimes wisely agree that a Of congresses. congress, or international meeting, for the amicable settlement of affairs in dispute between them, shall take place. Deliberations of such a kind should be conducted in the spirit of sincerity and concord. The ceremonial to be adopted occasionally forms the subject of a preliminary convention. There are, however, some points established by national custom:—

The ministers are generally sent as plenipotentiaries, and not as ambassadors.

They either interchange their full powers, or, if there be a mediator, hand them over to him.

(*a*) See treaty of Utrecht.

The conferences are conducted by the ministers, and in the presence of the mediator, if there be one.

The hall of conference is sometimes a public building previously agreed upon; sometimes alternately at the dwelling of the ministers; and sometimes at the residence of the mediator.

The discussion is either verbal or written, and is continued until terms are concluded, or an adjustment is broken off.

The precedence is yielded to the mediator.

The duty of
states towards
subjects.

CXXIX. States are bound to protect their individual members in the possession and enjoyment of their lawful rights and rank, as parts of the bodies politic. Nothing but extreme necessity can justify their abandoning them. If a subject be grossly ill-used, the nation should demand just reparation; and may wage war if it be refused.

The duty of
subjects to-
wards states.

CXXX. It is the duty of the members of the state, to obey natural, civil, and international law. It is the fashion for jurists to insist that conformity to the two latter branches of jurisprudence, is all that the state can demand. But it is the obligation, and it will be the practice, of well-disposed patriots, to forward the cause of virtue to the full extent; and not to be satisfied with the eye-service of human discipline, which general codes or arbitrary customs impose.

The account-
ability of
states on be-
half of their
members.

CXXXI. It is incumbent upon nations to protect all other public bodies from the commission of injuries by their subjects, or to cause reasonable reparation to be made for them when committed. As, however, from

the constitution of political society, it is impossible for sovereigns entirely to prevent such wrongful acts, they should not be identified with them, excepting so far as they encourage them, refuse their reparation, or harbor the criminals.

CXXXII. It being a fundamental maxim of international, as of civil law, that the public will is expressed only by the sovereign power, it is cruel (*a*) to inflict upon subjects severe penalties for acts done in express obedience to their civil power, unless the acts complained of be gross outrages upon the laws of nature, and such, therefore, as they should not, even at their sovereign's command, have been guilty of. But the people are bound, in the case of uncalled-for hostilities, to return any prize improperly taken by them in the war.

The accountability of members on behalf of states.

CXXXIII. Public war (*b*) is a state of contention, by force, between two disputing sovereign powers, for the recovery of rights, or supposed rights. If the rights of a sovereign power be invaded upon, and remonstrance be unattended with satisfaction, there are no alternatives left to the injured party, but either to submit to the wrong, or forcibly to insist upon redress.

Of public war generally.

War is permitted by international law only when necessary to secure peace. War is defensive, which protects our perfect rights; or offensive, which demands them. Although the war be unjust on one side, on the other it is well-founded.

(*a*) See contra:—Grot. de J. B. et P. lib. iii. c. 10.

(*b*) See book i. c. 14.

What war is
just.

CXXXIV. The expedient of war is so dreadful, that every good sovereign will have recourse to all dignified and prudent means of avoiding it; and will undertake it only for obtaining justice not otherwise to be had. The violation of the perfect and important rights of a nation, such as the infraction of passports, truces, and treaties, justifies its exercise. The just grounds of war are:—

To defend our perfect rights against open and unjust attack—

To obtain reparation for wrongs committed—

To secure our future safety against the continuation of a system of open injustice.

The parties who may engage in it are nations whose perfect rights have been violated; and any other nation which is satisfied of the justice of its ally's conduct, and which has not undertaken to support the warlike interests of the other contending party. The reason of this right of interference has been before stated (a).

The complaining party may demand equivalent reparation for the wrong sustained, and reasonable security against its repetition.

We may wage war upon a nation for an injury of consequence, done by some or one of its subjects, if the state have caused it or permitted it, or sanction it when committed, by harboring the criminals.

If a foreign power be making busy preparations for war, it behoves other states, in self-defence, to use wise precautions, in order to preserve their interests; and it is reasonable to inquire of the sovereign, whether the hostilities in view be contemplated against them.

(a) See book i. c. 14.

His royal word, if he be a good prince, must be taken; and war cannot be declared in defiance of it. The formerly-existing and peaceful european custom of mutually stipulating, in treaties of peace, that the troops should be disbanded, is in some measure abandoned.

It is a most unauthorised attack upon the liberties of nations, to exercise violence towards them for false worship, singular political institutions, or other things which merely concern themselves. When men fight under the influence of religious or political fanaticism, their cruelty and indiscretion are boundless.

CXXXV. No private attacks of subjects, even if the whole of them join in it(a), without the sovereign's authority, constitute public war. They are rather acts of piracy or robbery, than national violence. They do not therefore amount to an infraction of a national league of amity.

Mere attacks
of subjects
not war.

CXXXVI. The following are the essentialities of a just public war.—

Of the essen-
tialities of a
just war.

1. The cause of complaint must be well-founded, and of sufficient importance.

2. Satisfaction must have been demanded and refused. If the ambassadors or envoys employed fail to conciliate, and the arbitration of another state, which is discretionary with the parties, be not adopted; war is the only source of justice.

(a) See 4 Co. Inst. 152.—Spelm. Gloss. *Faida*.—Du Cange. Diss. Sur Joinv. p. 330.—Ward, ii. pp. 294, 340.—Civ. L. Ff. 50, 116, 118.—Bl. Com. i. c. 7.—Turnb. Hein. ii. sec. 189.

3. The common will being expressed by the voice of the sovereign, the war must be commenced by the proper civil authority, or by persons authorised by that authority (*a*).

4. It should be publicly declared in form (*b*), by the proper authority, excepting as to a power which we are obviously at war with.

The three first rules are clearly just. The last is observed in modern Europe, as it was among the ancients (*c*). Formal declaration of war is necessary, to show that the act is not the mere deed of unauthorised individuals—to operate as the last admonition to the enemy—and to discriminate in the cases of captures. Bynkershoëk (*d*) denies the necessity for a public declaration of war, although he allows its magnanimous nature. Burlamaqui (*e*), in the enthusiastic warmth of chivalry, declares that we are not at liberty to wage war immediately upon its declaration, but that we are bound to allow to our enemy time for preparation. This is however more than justice requires.

Of the declaration of war.

CXXXVII. It is not necessary that a particular time should pass between the demand of satisfaction, and the declaration of hostilities. But the ancient custom (*f*) of allowing thirty-three days to intervene, ex-

(*a*) Case of East India Company.

(*b*) See contra:—Thomasius ad Huber. de J. c. 3. 4. 4. 27.—Turnb. Hein. ii. sec. 197.—Necker, du pouvoir Exécutif. i. p. 282.

(*c*) See Herodot. lib. v. sec. 105, 108.—Larcher's notes on ditto.—Virg. Æn. lib. ix. 52.—Chardin's Voyages, iv. p. 302.—Livy, lib. i. 32.—Cic. de Off. lib. i. c. 11.

(*d*) Q. J. Publ. lib. i. c. 12.

(*e*) Pol. Law.

(*f*) See Livy, lib. i. c. 31.

hibited a spirit of merciful moderation, which conferred high honor upon the roman name.

Unilateral declaration evidences a state of war. It cannot be necessary for one country to declare what the other has already promulgated.

It is a reasonable custom to state, in the declaration of war, the reasons which induce hostilities. This cannot be necessary when the declaration is conditional, to take effect if the demand made be not complied with. It is essential that the declaration should be made known to the opposed power, to neutrals, and to the subjects at home; and it should precede the acts of hostility. No particular ceremonial is necessary, although customary forms should be adopted.

In some ancient, and, as it is said, in some modern countries, declaration of war has been made by throwing an arrow, or other weapon, over the enemy's borders.

The manifesto or declaration should be couched in terms as inoffensive as can be. It may be omitted if the herald's life be in danger, from the savage practices of the enemy; but not because the national antagonist does not himself declare war. It is unnecessary against a country which has already taken up arms offensively. War was proclaimed against the transylvanian prince, for three successive days, in Constantinople, by Mahomet III., although decided hostilities had previously been carried on.

Foreigners are entitled to a reasonable time, to return with their property, after the declaration of war. It was conduct well worthy of an english king (a), to grant security of person and property to french aliens,

(a) Charles II. Declar. of War. ag. France, Feb. 9, 1668.

after declaration of war, provided they properly demeaned themselves.

A defensive protection of the national interests against sudden attacks, is justifiable, without even the consent of the sovereign power, it being presumed that they are consistent with his guardian will.

A declaration of war operates as an interdiction of all commercial intercourse with the enemy.

In very extraordinary cases, war may exist without a declaration on either side.

Of alliance in
war.

CXXXVIII. A sovereign power may, by treaty of alliance, agree to assist another nation on all just occasions. The refusal to promote an unjust cause, or so to assist as to endanger our country, is not a breach of a treaty of alliance. Allies are generally inviolable in person and property. Neither an ally nor its subjects has a right, without the consent of the confederate country, to trade with the enemy, under the penalty of the confiscation of the property engaged, in the court of the other ally; war being regarded as a state inconsistent with commerce, and trading with the enemy being considered as an unjust promotion of his interests. The construction of the *casus fœderis* must be similar to that of an ordinary agreement. Allies in common cause cannot claim from each other any compensation for loss. They are bound, in all things, to act conjointly, unless one of them demand what is clearly unjust.

The appointment of the generalissimo—the planning of the martial operations—and the settlement of the demands to be insisted upon—should be well understood before the commencement of the hostility, lest those subjects should afterwards become the grounds of dispute.

The whole of the prize made is divisible between the allies, equally, or, rather, according to the just proportions of the case; and is subject to postliminium.

An ally, in general, has no right to do any act tending to prejudice his confederate, so far as regards the subject of the alliance. But neither is he justified in sanctioning any unreasonable demand of such confederate. The principal obligation which he labors under is, to assist in securing to his ally his just claims.

Amongst civilised nations, an ally furnishing troops or money, in aid of a war, under a treaty, whether of general, or of special defensive alliance, is not treated as an enemy by the adverse power. This principle is now so clearly established among nations, and has been so frequently acted upon, that I do not consider it necessary to mention any of the cases in which it has been recognised. The rule exhibits a high state of international refinement, and, *a priori*, that is, in the absence of general consent, would not be adopted. The Romans and their enemies were of a different opinion. In fact, the very destruction of Rome was attributable to a contrary course of conduct.

CXXXIX. Auxiliary and subsidiary troops are at the disposition of the power assisted, although they are usually paid by the ally. But they are not transferable. The principal is entitled to the booty; and he may make peace upon terms not disadvantageous to the auxiliary.

Of auxiliaries
& subsidies.

CXL. It is necessary to lay down clear rules to be observed in public warfare:—The rights of war, *cæteris paribus*, are the same with nations, as with men in a natural condition. Only that degree of force

Of the just
mode of car-
rying on war.

is lawful, which is necessary to the attainment of the just end intended by the war. All kinds of violence against an enemy are not lawful: all mischief, which is more injurious to the party attacked, than conducive to the end sought for, is unjust. For then nations are, upon the whole, the worse for it. War should not subvert the common offices of humanity. The depriving the opposite power of its combatants, and of its public property, may with propriety be accomplished. So far destruction is lawful. The persons and property of the hostile subjects are liable to be seized, instantly after the declaration of war, as a kind of security for obtaining justice, unless, as is now often the case with european nations, a space of time for their removal has been secured by treaty.

But injury and loss should, as much as possible, be averted from the inhabitants of the invaded country, who are not actually combatants, and the seizure of whose property would not immediately affect the issue of the war. The enemy should, however, be at liberty to purchase necessities from the inhabitants, at fair prices. Assassinations, killing or torturing captives, violating females, demolishing buildings which are not places of resistance, profaning religious erections, and bribing subjects and soldiers, are unjust; as not tending to the accomplishment of the legitimate object of the war. The general mitigations of civilised nations should be observed among them, as tending to the advantage of all. The destruction of private property, as the goods of merchants^(a), does more harm to the opposed, than good to the opposer; and is therefore unjustifiable, unless it be essential to the end of the hostilities.

(a) Conduct of Buonaparte.

Violent resistance lasts so long as the enemy exhibits a hostile disposition. According to the practice of nations, the war is directed, as well against the commerce of private subjects, as against the arms of the public power. In war, as little harm as possible should be done, its object being only victory. So in peace, as much good as can be; its object being general preservation. It is unlawful, by unjust force, to place a king upon the throne of a people.

The use of poisoned weapons, poisoning fountains, and all other means of unnecessary cruelty, are unlawful (*a*). The object of war is rather to overcome than to destroy. The degree of injury which may lawfully be inflicted, depends upon the necessity for its adoption. It is a monstrous principle, that every possible kind and degree of violence is justifiable in national contests. This is a doctrine totally irreconcilable with mercy, civilisation, and even justice itself. Destruction of life is rather an incident of war, than the object of it. If I want possession of a military spot, and use only so much force as is necessary to obtain it, my design must be considered rather to gain possession of the station, than to take away life.

Persons exempted from being killed in war, are those who cannot bear, or do not use, arms; as women, old men, children, chaplains, surgeons, and the desperately-wounded; together with those who have laid down their arms, if they can be safely guarded; unless, for some internationally-cognizable crime, they deserve to die. The exception also of drummers, fifers, and trumpeters, is not, I think, warranted, if they be playing martial airs; as they tend to excite the energies of the combatants, and thereby contribute to the

(*a*) See contra:—Turnb. Hein. ii. sec. 199.—Wolff.—Ward, i. p. 253.—Mat. Paris. 105.

cause of violent resistance (a). The conqueror should take care of the wounded, and bury the dead. These duties, so interesting to every lover of humanity, have been performed from a very early age. In time of war, the rational claims of mankind do not cease. Rashness and cruelty, even between foes, are culpable. All things should be done calmly and nobly. Those who have erred but a little should be forgiven; and those only who have greatly and wilfully erred, should be punished. It is an act far from becoming, to inflict injuries upon combatants, on account of the valiantness of their defence or attack. Soldiers reconnoitring the lines of their enemy, may be shot, if they cannot be taken prisoners.

Officers must have a degree of discretion vested in them: but they are not to act at random, and excuse themselves upon the supposed necessity of the case.

A commander may resort to any necessary mode of resistance. It may appear cruel, at all times to use red-hot balls against an enemy: but the brave general Elliott, at the tremendous siege of Gibraltar, having no other means of demolishing the floating mahogany and cedar batteries employed against him, and which were supposed to be bomb-proof, was justified in throwing upon them showers of heated balls, by means of which he effectually defeated his enemy.

*Of good faith
& stratagem
in war.*

CXLI. Good faith is binding upon enemies, as well as upon friends. Fidelity between foes gives birth to a thousand happy consequences.

But false communications, or feints, are to be justified. Deception, in hostile acts, is not perfidy—each

(b) See contra:—Von Martens, book viii. c. 3. sec. 4.—Turnb. Hein. ii. p. 221.—Hom. Odyss. x. 59.—Iliad, x. 14, and 178.

party is known to avail himself of all the stratagems possible to secure success—and to overcome an antagonist by surprise or ambuscade, is more merciful than to vanquish him by dreadful carnage. It has always been the practice to assume disguise upon occasions of warfare. There is no faith due from one enemy to another; excepting so far as they have voluntarily pledged themselves to each other.

Treaty is, so far as it goes, a disclaimer of enmity (a).

CXLII. A belligerent power may blockade the enemy's ports. The declaration of blockade is one of the high prerogatives of sovereignty. It cannot be declared by subjects, of their own accord; nor have they power to extend its operation. Blockade is generally effected by a naval arch of enclosure around the entrance of the port. In order to constitute a valid blockade, there must be a sufficient blocking up of the port, to exclude foreigners from entering it. As this right is often severe in its operation, maritime courts require clear evidence of its exercise. Subjects, as well as neutrals, are bound by the declaration of it.

Of blockade.

Blockade is by an act alone, or by an act with notification. In the latter case, it must be presumed to last until the revocation is notified; unless the raising of the blockade, as the abandonment of it is termed, be expressly shown by overt acts. Blockade is broken both by ingress and egress, or by wilfully attempting either. It is not violated by an act of extreme necessity, if there be no other port into which the vessel can put; nor is it broken by inland canal communications. The blockade is not abandon-

(a) See contra :—Puffendorf.

ed by an act of God: as if the blockading squadron be driven off by wind. The ship's liability to confiscation, after she has escaped from the interior of the naval arch, terminates with her voyage.

The cargo is involved with the ship; as the purpose of the owners must, in general, be taken to be the same as that of the master.

Neutral merchants may withdraw ships and goods, sent into the port before the declaration of blockade. Their ships may also come out with ballast, if unconnected with the commerce of the prohibited port. But, with these exceptions, all commerce with the enemy, by breach of the blockade, is an act entailing confiscation.

The declaration of blockade by a regent in the royal name, is necessarily as binding as that of an individual sovereign. The british ministers therefore well cautioned their subjects against the breach of the late blockade of Oporto.

Blockade is a term also applied in military tactics, to the cutting off supplies from a place, or fortress. Investment means close siege.

Of sieges.

CXLIII. In a case of siege, a summons should precede the assault. The repetition of the summons is optional with the besieger. No buildings but the military works should be demolished in the storm, unless essential to victory. The lives of the besieged must, upon capitulation, be spared, excepting by way of exemplary punishment, when the laws of war have been shamefully infringed upon; and it is a commendable custom for the general-in-chief to forbid pillage.

It has been supposed that the lives of the garrison and of the male inhabitants, may, after the escalade,

be taken away, but it is seldom or never lawful to kill a captured enemy. It is recorded (a), that at the siege of New Heusell, in 1685, the whole of the enemy was put to the sword by the christians. In the MS. account of the siege of Buda, preserved in the national library of the british museum, the author, although he states the slaughter to have been less than was expected, acknowledges women and children to have been killed, not by accident, but in the heat of the action—a mode of warfare which is far from consistent with ordinary, much less with refined humanity.

CXLIV. Terms of capitulation are generally settled between the besieged, and the besieging commanders. A general has the power of concluding a capitulation; The terms agreed to, whatever they are, are binding upon both the immediate parties, and upon their sovereigns also, unless the commanders accede to terms not confided to their discretion. Articles of capitulation do not affect, as capitulants, subjects residing in a remote place. I shall have occasion to treat of the conquered in a future section.

Of capitulation.

CXLV. The rules just laid down will show the unnecessary cruelty of attacking the persons and property of peaceful individuals, at sea, upon the mere ground of their being subjects of a hostile power. It is desirable that civilised nations should agree not to subject alien-enemies to additional misery, after they have escaped from the appalling horrors of the storm, and are by stress of weather driven into an adverse port. The interests of commerce, which benefit most

Injustice of attacking persons and property of peaceful individuals in war.

(a) Harl. MSS. 4989.

countries, from an additional consideration of importance against such an unjustifiable system. And as, in general, the interests of each contending power are alike injured by the practice, there is the less reason for its continuance.

The alleged objection of the unequal extent of commercial dealing between nations, if the fact can be proved, is easily answered. Every nation is presumed to render its commercial, as well as its other interests, as prosperous as possible. And the existence of partial injury is no argument against the production of general benefit. Nothing annoys an enemy more than kindness. It is an arrow which always hits the mark. It is the most severe, yet the most noble mode of treatment.

But persons openly favoring, or actually assisting a hostile power, are not included within the proposed exception.

Of prisoners
of war.

CXLVI. Combatants have a right to kill their antagonists, only to secure the purpose intended by the war. If, therefore, by taking them prisoners, they can be deprived of the means of resistance, the end is so far accomplished; and to kill them is causeless harm. It is cruel to kill prisoners of war unnecessarily, or for national aggressions (*a*). No suffering but that of imprisonment should be inflicted. To put a prisoner in chains, if he can be secured without, is unlawful. Prisoners of war were cruelly treated by the Spartans *b*). They are never treated by the civilised na-

(*a*) See contra:—Von Martens, book viii. c. 1, sec. 3, note.

(*b*) See Herodot. lib. vi. sec. 75.—Pott. arch. Græc. i. c. 10.—Cragius de rep. Laced.

tions of Europe as slaves; and the severe rule of taking the persons and goods of national adversaries, is sometimes mitigated by reciprocal stipulation—sometimes by the voluntary mercy of states.

The Turks have not been the only people who have subjected prisoners of war to slavery. In the MS. account (*a*) of the siege of Buda, preserved in the national library of the british museum, the author states the largeness of the booty acquired upon capturing the turkish women, who had attempted to escape to Belgrade, “besides what the women and children will sell for,” a term which cannot be fairly applied to the subject of ransom.

Humanity turns pale at the historical accounts of cruelties inflicted, in former times, upon defenceless prisoners (*b*).

Prisoners of distinction should be respectfully treated. The victor is entitled to such property only as was seized with the person of the prisoner; and that is sometimes generously yielded, particularly by officers. Prisoners taken to a neutral port must be released.

If a foreigner be driven by stress of weather into the port of a country at declared war with his state, his person and goods may be justly seized. But it is otherwise if he entered the country before proclamation of war; as it has been determined by the unanimous voice of the english judges (*c*). In the latter case, however, the foreigner is not entitled to protection, unless he immediately return to his nation, or be permitted by the state to remain in its territory.

(*a*) Harl. MSS. 4989.

(*b*) See Cod. leg. vet. Spelm. Wilk. p. 283.—Mod. Un. Hist. XXVIII.—Mat. Par.—Froissart.—Monstrelet.—Villaret.—Fazellus de reb. Sic.

(*c*) See Jenk. 201.—Ow. 45.—Freemant. 41.

A prisoner, taken against his will, may try, by force, or stratagem, to escape, if he do not break parole, or did not surrender to save his life. If a prisoner be set at liberty by an enemy, on condition of never again bearing arms against him, he cannot, even upon being required by his country, break his parole, excepting in immediate self-defence. For a prisoner of war to break parole is disgraceful. He is bound to return to the enemy, if the conditions upon which he was released, be not performed. This principle has been improperly disputed (*b*) with relation to princes. The life of a prisoner who has broken parole, may be taken, if he be recaptured in war.

It is highly irregular to try a prisoner of war, according to the forms of law applicable to a subject.

Prisoners of war should be decently buried at the expense of the state in which they are confined.

A nation has a right to demand a ransom for its prisoner's release. The sum is discretionary with the captor, unless national agreements as to amounts of ransom have been previously made.

Prisoners should be regarded by their own nation, as retaining all their civil rights as subjects. Among these is that of marriage, and testamentary disposition. Their obligations to the state remain, so far as they can be performed, undiminished.

Of ransoms.

CXLVII. Ransoms, or sums paid for the release of captives taken in war, are abolished amongst civilised nations. The practice existed, to a great extent, in the middle ages, and saved the lives of many gallant soldiers. It formed a rich source for the supply of

(*b*) See Spav. Puff. ii. p. 301.

magnificence, to brave and enterprising knights. The amount of a subject's ransom, was generally a year's income. The sums paid for the ransom of sovereigns were often very considerable. Thus Edward the Third received three millions of gold crowns, of the computed value of a million and a half of our present pounds sterling, as the redemption-money of John, king of France. David, king of Scotland, paid 100,000 marks for his release, after eleven years' imprisonment. The Duke of Alençon paid 200,000 crowns, ransom (*a*). The ransom-money of Charles of Blois was 700,000 crowns. The ransoms paid by unroyal personages were often large in amount. The duke of Suffolk, Michael de la Pole, paid 20,000*l.* sterling (*b*). A treaty of ransom was made for the delivery up of Oliver de Clisson, constable of France, in consideration of 100,000 livres. It was optional in victors, to accept ransom or not. The common notion that prisoners formerly might demand their liberation, upon the tender of a fair ransom, is opposed to historical record.

A contract of ransom made without fraud, and 'for better, for worse,' cannot be rescinded, upon the discovery of new facts. Such an agreement is determined by the prisoner's death. A person retaken, after being fully released, is liable to pay a second ransom. The right of ransom may be transferred, upon condition of the transferee treating the prisoner with the same humanity and justice as is obligatory upon the person transferring him. The amount of ransom should be proportioned to the injury received, and to the rank of the prisoner.

(*a*) Villaret, iii. 389.

(*b*) See Speed, 675.

Of cartels.

CXLVIII. Cartels, which are agreements for the exchange of prisoners, are of modern date, and succeeded to the practice of ransoms. No nation is bound to agree to them, but they are often wise and merciful.

The exchange of prisoners is so important to the cause of humanity, that only the original purpose of cartel-ships must be adopted. Cartel-ships conveying prisoners in exchange, are liable to be confiscated, if employed at the same time in trade. Things on board of a cartel-ship, and which are immediately applicable to warlike purposes, are seizable. Cartel-ships are protected whilst going, staying, and returning. Prisoners on board a cartel-ship to be exchanged, and taking or rescuing her, are guilty of an unlawful act, and are not entitled to prize-money; the capture being illegal.

Cartel-contracts may be prospective. As they are made for the mutual exchange of prisoners, they apply only to belligerents.

*Of acquisition
of property in
war.*

CXLIX. The moveable and immoveable property of an enemy is seizable, subject to recapture, in order to enforce a just peace—to make due reparation—to repay the cost of the war—and to prevent future aggression. But these objects being attained, a victor has no right to impoverish the conquered. The booty and immoveable property taken, are subject to the disposition of the prince, according to the legal stipulations of his nation.

Morally, a just war only can give a good title to possessions. But as the power declaring war is necessarily the party competent to determine its justice, the

principle, although it exists in theory, can scarcely be applied to the affairs of nations. The justice of taking up arms is confided to the breasts of the war-makers; and the natural consequences and acquisitions of a war must therefore, politically speaking, be considered as just, on each side of contention (*a*). But, in a moral sense, the unjust litigant is not exculpated. This law of acquisition is to be considered as valid, only as regarding its external effects in the world.

CL. It requires no argument to satisfy the reflecting reader, that the breaches by a nation of imperfect obligations, do not justify resort to violence. But there are many occasions upon which a state may, with the strictest propriety, act in turn towards an alien power, as that power has itself acted towards the retaliating country, for the purpose of obtaining justice, by means different from those of physical force. I am, however, bound to add, that much discrimination is necessary in the use of this mode of obtaining what is right. Retaliation has been too often applied to cases to which it was unadapted. Nations have too frequently forgotten that liberal feeling which should be as assiduously cultivated amongst independent states as between individuals.

Of the remedy as to breaches of imperfect obligations.

Retaliation is the rendering of like for like. It is misapplied, when it is used to express the infliction of a great evil, on account of a smaller one. If a man unjustly cut off another's finger, and the injured party cut off his enemy's head, can this be called retaliation?

(*a*) See Burlamaq. iv. c. 7.—Grot. de J. B. et P. lib. iii. c. 6. sec. 2.—Woodd. El. Jur. p. 74.

Of national
reprisals.

CLI. National reprisals are the seizing by, or by permission of the sovereign power of a state, the effects of another state, or the subjects of it, in order to satisfy a debt due from, or a wrong committed by it, after reparation is demanded and refused.

They are justifiable (*a*) as a more gentle method of reparation, than war. They are not grantable for the benefit of foreigners. They may be forcibly insisted upon. The persons suffering are entitled to indemnity from their state, unless the original wrong was of their own sole personal commission. The persons or goods seized, are detainable, so long as just compensation is refused; but after a reasonable time has been allowed, the property may be sold, and the overplus, if any, should be returned.

Reprisals are not recoverable from foreigners, on account of the wrong of a state to which they owe but a temporary allegiance. Embassadors are exempt from the operation of this right; but not women, clergy, lawyers, and scholars, unless by special treaty.

As little harm should be done by the enforcement of this kind of remedy, as is consistent with its end. The persons of subjects may be seized by way of reprisal, and their property and liberty disposed of; but their lives cannot, in such an event, be taken away. General reprisals are equivalent to open war.

Of interna-
tional retalia-
tion, by tak-
ing away life.

CLII. Von Martens justifies (*b*) the putting a prisoner of war to death, by way of retaliation, as he terms it, for the unjust acts of his state. Although some kinds

(*a*) See contra :—De Witte.

(*b*) Book viii. c. i. sec. 3, note.

of retaliation are allowed, as observed in the last section but one, the breaking faith with a prisoner of war, by depriving him of life, is an act which I cannot allow to be justifiable. What reparation for the faults of the guilty, can the murder of innocent persons make?

CLIII. The *jus postliminii* is the right of restoring persons and property taken by an enemy, to their previous state of freedom and ownership, upon their returning into the possession of the original proprietor, during the war. Of postliminium.

Every nation assumes the war which it declares to be just. And if it were otherwise, there would be no reason why individuals should partially suffer for the acts of their government. Accident gave to the public antagonist the thing in question—accident restores it to the former owner.

Persons and property retaken by allies in common cause with a nation, are as much in principle, restored to that nation, as if they were recaptured by the state itself which lost them. The right of postliminium does not exist in neutral territories. It does not therefore take effect in those nations which have merely by treaty granted auxiliaries, or pecuniary assistance, and are not in open warfare with the enemy.

The supposed difficulty of recognising moveables, and the consequent disputes to which the claim for their return would subject the combatants and other parties, have established an exception as to booty of such a kind, and ships; which are not liable to this kind of restoration, unless retaken within a reasonable time, as

some writers contend; or within twenty-four hours after capture, as others (a) maintain. But the true test is the legal sentence of condemnation, after which the right of postliminiary reversion ceases.

Towns, territories, and prisoners, which are retaken by the sovereign power, revert to their original ownership, if such reversion be not contrary to that faith, the observance of which is a law of war. Alienation by the enemy does not preclude immoveable property or persons from this right; for the transfer must have been with all its faults.

The voluntary submission of the state to a conqueror extinguishes the right of postliminium, together with its relations of alliance. A treaty of peace, too, is a waiver of the right.

Sovereigns are bound to secure to their subjects the reasonable benefit of postliminium, as to their liberty, or things formerly belonging to them.

It is not necessary to explain the various effects which treaty, cession, or well-established usage may have upon this right.

Of neutrality
in general.

CLIV. A public power, which has not entered into any treaty to which the war has reference, has the privilege of remaining neuter.

No more favor should be shown by a neutral state, directly or indirectly, to one combatant than to another. Strict impartiality should be observed. It should be, so far as it is possible, perfectly passive as to the war. The belligerents on each side should be permit-

(a) See De Thou. Hist. sui Temp. ad H. A. liv. xiii.—Emerigon.—Wisket.—Bynk. Q. J. Publ. i. c. 5.

ted to pass, or both should be restrained from passing, through a neutral country. This principle is of equal benefit to all combatants, and cannot therefore be a subject of rational dispute.

Measures of violence between enemies, are unlawful in a neutral territory; and the ships and cargoes of either party may be seized for a breach of the territorial rights, in order to make reparation for the damage. But the neutrality, to justify such a seizure, must be strict, and *bond fide*. The seizure can be made only by the neutral power.

When a violation of neutral territory takes place, that country alone whose tranquillity has been disturbed, possesses the right of demanding reparation for the injury which it has sustained. It is not the business of other countries to claim the rights of the neutral power. The mere claim of neutral individuals, and not of the state, is insufficient.

It is unlawful to exercise hostility within gun-shot of a neutral territory. But although the use of a neutral territory, for an immediately-hostile act, or proximate purpose of war, is not permissible, remote measures, as procuring provisions &c., do not fall within the rule. The kind of act is unimportant, if it be a clear waging of hostility: although it be inchoate, still it is unlawful, if it be a commencement of actual hostility. The inconvenience to which the neutral territory is subjected, is the reason for such measures of war being forbidden. A capture of a vessel, therefore, within a neutral territory, or by boats from a ship stationed within one, is illegal.

If the neutral power have shown more favor to one than to the other; if he have excluded the ships of

one of the belligerents from his ports, and have hospitably received those of the other; he cannot be considered as acting with the necessary impartiality. The high privileges of neutrality are lost by the abandonment of perfect indifference.

Neutral property found in an enemy's merchant-ship is protected (a), without prejudice, however, to the rights of the capturing enemy; unless the neutral party be the agent of the belligerent, or use false papers of evasion. But a neutral's goods are not protected in a hostile ship of war.

An enemy's property found in a neutral vessel is free from confiscation, if not contraband of war. The character of the ship determines that of the goods also.

It sometimes happens, that a sovereign enjoying more than one crown, is at war with a state on account of a portion of his dominions, whilst he is at peace with it as regards another portion of them. Thus, if the king of Hanover wage war simply as such, against another nation, his political character must be considered as distinct from that of the king of England: for the hostility is not between the royal individuals, but between the sovereign powers.

Of an armed
neutrality.

CLV. The declaration of the empress of Russia, in 1780, as to her determination to support her royal views with regard to neutral commerce, by force of arms, gave rise, it is said, to the custom of keeping up an armed neutrality.

There is no international objection to the existence of an armed neutrality, so long as it confines its force to the establishment of neutral rights.

(a) See contra:—Grot. lib. iii. c. 6.

CLVI. Contraband is a term used to express prohibited commodities, which are bought or sold, imported or exported, contrary to the laws and interests of a state.

Of international contraband.

The conveying of internationally-contraband articles of war(*a*) to a hostile port, although the property belong to subjects, as being noxious to the state, renders the ship and its contents liable to a forfeiture; excepting so far as the seizure is restrained by treaty. Such commercial intercourse is prohibited upon general grounds of expediency, and is construed as an adherence to the enemy.

Some countries have, by treaties(*b*), agreed that the freight and expences only shall be forfeited by the neutral owner, excepting under circumstances of malignancy or aggravation; it being liberally considered that innocent parties should not be held strictly responsible for the loss. But a vessel with a wilfully-false destination in her papers is clearly condemnable.

All such property of an individual as is engaged in an illegal transaction, is liable to confiscation. Owners ignorant of the act whereby confiscation is produced, do not generally lose their shares in the ship thereby. Unclaimed contraband articles, which appear by the ship's papers and the other evidence, to belong to a part-owner, affect his share of the vessel.

A ship is liable to be condemned as contraband, if it appear, from the facts, to be of a really-condemnable

(*a*) See prohibitions of Popes Alex. III., Innocent III., Clement V., Nicholas V., and Calixtus III., as to the infidels.

(*b*) See Declar. of Eng. and Holl. ag. Spain, 17th Sept. 1625, art 20.—Treaty bet. Engl. and France, Nov. 3, 1653, art. 15.

kind; however ingeniously fraud may have raised plausible pretences in favor of its security, and the innocence of its owners. One article of a contraband nature affects all the cargo belonging to the same owner.

Things protected from forfeiture are:

1. Such articles as are merely intended for the support of life, or for the ship's innocent use.

2. Unmanufactured articles, under reasonable limitations.

3. Such as are of the growth and produce of the exporting country, if not clearly intended for a hostile purpose; and whether exported in the ships of the country, or in neutral vessels.

Pitch and tar, if in the course of conveyance to the enemy, and not the produce of the country from which they are exported, are so far contraband, as to be liable to the right of preemption. Resin is not of so decidedly warlike a character, as to be contraband, unless sent to a port of equipment. Hemp of inferior quality, and unfit for working into cordage, is not contraband. Ship-timber, if being conveyed to an enemy's port of hostile equipment, is liable. Sail-cloth is contraband, even if being carried to a general port. Copper, fit for the sheathing of ships, is contraband, and masts; to whatever port sent. Cheese, being conveyed to a place of warlike equipment, and fit for military or naval use, is seizable. Articles of food are liable, if it be more probable that they were, than that they were not, intended for military or naval use against the capturing power. A ship sailing to an enemy's port to be sold to him, for his naval use, is contraband. Naval and military stores are seizable, without reference

to the ordinary or warlike character of the port to which they are in the course of conveyance; if that port be a hostile one. A neutral bottom does not protect property which is otherwise liable to confiscation.

The ship of an ally or neutral cannot be seized upon the mere ground of its containing an enemy's goods, if of an innoxious character.

Goods not falling within the above description of contraband, found in an enemy's ship or territory, but clearly belonging to those who are at peace with us, are not seizable; but they are to be presumed the enemy's, until the contrary appears.

The contraband practices of subjects are not imputable to their sovereigns, unless they expressly sanction them. The complaint of a king is not necessary to justify the seizure of goods as contraband. On the breaking out of a war, the sovereign declaring it, in Europe, generally advertises contraband articles; and neutrals thereupon forbid their subjects from dealing in them. Such advertisements are to be considered rather as cautionary notices, than as imperative laws.

The burden of proof of the non-liability of articles seized, lies upon the claimant from whom they are taken.

Things originally contraband are released by the change of character of the place to which they are in the course of conveyance: as by such place becoming a part of the territory to which the cargo would have been forfeited.

A king, of his own authority may relax, but cannot extend, the operation of the laws affecting nations.

What is not contraband by the universal law, cannot therefore be rendered so by proclamation (a).

It is the right and the duty of the monarch to release individuals from these penalties, in cases in which they operate with inequitable severity. Indulgence should be shown by governments as to goods contracted to be supplied to them, but which necessity, occasioned by the breaking out of the war, compels the proprietor to part with, on his return to his country.

Of preemption.

CLVII. The mitigated practice of preemption has been lately introduced into Europe, which, in particular cases, subjects the property seized only to purchase at a reasonable rate, of the proprietor, whose interest is divested. The rate is not to be calculated according to the peculiar wants of the enemy to whose port it is destined, but according to a general and reasonable rule.

When government has a right of preemption, its decision, whether it will buy or not, should be given with promptness.

Of condemnation as to sea-prizes.

CLVIII. The sentence of legal condemnation in the court of admiralty, is generally requisite to secure property in a sea-prize. The rules of twenty-four hours' possession, and of being brought *infra præsidia*, are not true international tests.

The condemnation of prize-ships in the ports of a neutral power, by a consul, is, at the most, binding only upon the subjects of the state which the consul represents.

(a) See Sir J. Mackintosh, judgm. Prize Court, Bombay, Sept. 11, 1807, note of Mr. Hargrave, in his Rob. Adm. Rep. Brit. Mus. vol. vi.

The principles of seizure and condemnation apply as much to the property of allies, as of subjects.

CLIX. An embargo is the detention of foreign vessels in the port where they are lying, on the breaking out, or declaring war, for the purpose of the public good. It is justified upon the ground of hostility being commenced—upon the retroactive force of the determination to obtain justice. The property seized is liable for amends for the wrong sustained, as in a case of trespass. Of embargo.

CLX. A licence is a permission, granted by the sovereign power, to do some act, which, without it, the party is politically disabled from doing. Of licences.

Licences should be liberally construed, so far as they can be with public security. Being granted in war, and for warlike causes, they are determined by peace. They should not be held to include powers not constructively contained in them. They must be faithfully used; and the terms expressed in them fairly conformed to. A licence to put into one port will not justify the putting into another. A ship licensed to deliver at a certain harbour, is free for her return-voyage, if not wilfully delayed. A licence to trade in one article, does not authorise the dealing in other things. A fraudulent alteration of licences, by whomsoever made, invalidates them.

CLXI. If the subjects of a nation be injured by those of another, the sovereign power may, upon a due representation of the facts, grant letters of marque and reprisal, by which the injured party is Of letters of marque.

empowered to reprise or seize the bodies, ships, or property of the subjects of the offending nation, in order to secure the just restitution. This mode has the advantage of attaining the honest end allowed by the natural law, without resorting to the general violence of an ordinary war. Sovereigns, upon granting such powers, generally require from the applicant a security, that the authority confided to him shall not be used for unfair purposes, such as the violation of treaties, or the promotion of smuggling.

A ship furnished with a letter of marque is considered as a ship of war. The prince should never issue it, but upon a denial of justice, and should use due caution in confining the use of it to its legitimate object.

Of emissaries. CLXII. The sovereign may punish emissaries who disturb the peace of the country.

Of spies, and deserters. CLXIII. Spies, deserters, marauders and banditti, may be, if it be essential to the public safety, put to death: their lives being forfeited according to the almost universal laws of nations.

Of parleys. CLXIV. A parley is a momentary cessation of hostilities, for the object of mercy or peace. The display of a white flag is evidence of the demand of a parley; and to attack the bearer of that symbol of humanity, is a barbarous outrage upon the rights of mankind.

Of truces. CLXV. A truce (*a*) is a suspension of arms, for a

(*a*) See Spav. Puff. i. p. 9.—Herodot. lib. i. sec. 21.—Justin. Hist. iii. 7.

certain period mutually agreed upon, or for an indefinite time, without prejudice to the state or claims of the war; after the determination of which, hostilities are renewed without fresh proclamation. They are made, for mutual accommodation, in order to bury the dead, abate for a time the rigors of war, offer up prayers to God; or more generally, to propose pacific measures.

Truces are of great antiquity, as we find from Homer (*a*), Herodotus (*b*), and Virgil (*c*). In Herodotus, we find an account of a truce of thirty years. We read in Robertson's history (*d*) of Charles the fifth, of a truce for five years, agreed to, for mutual repose.

Truces should be kept according to the rational meaning of them. War would be unnecessarily horrid, if opportunities were not allowed for attempts at probable conciliation. A temporary truce may necessarily be made by a military or naval commander. The sovereign only can agree to a general one.

Subjects are bound, from the moment of notification, to observe truces; and all pretended subsequent captures, are void. The violation of truces justifies new hostilities, and a demand of satisfaction for the violation. The terms and time of the truce should be cautiously expressed. With regard to preparatory works, either a strict equality or total cessation should take place. No undue advantage should be taken

—Livy i. 15.—Turnb. Hein. ii. sec. 215.—Sozom. Hist. Eccles. ix. 4.—Tac. Ann. lib. xiv. c. 33.—Virg. *Æneid.* x. 532.—Grot. lib. ii. c. 21, sec. 2.—Vatt. book iii. c. 16.—Stat. Hen. V. of Engl. I. c. 6.—Reeve's Hist. Engl. L. ii. p. 296.—Ruth. Inst. ii. c. 9.

(*a*) Il. iv.

(*b*) Lib. vii. 148, 149.

(*c*) *Æn.* lib. viii. 128.—Lib. xi. 132 to 138.—Lib. xii. 290, and 311.

(*d*) Vol. iv. p. 216.

upon either side. The war should be, in strictness, *in statu quo*. All hostile measures should be suspended. Yet the mutual safety requires that both parties should be vigilant. They may conjointly take defensive measures during the truce. But to repair breaches, or throw up new works, is, in general, a breach of truce. Truces give no right of postliminium.

The bearers of *bond fide* flags of truce are inviolable. Messengers of peace should be always protected.

The over-generous declaration of the roman *fecials* (a), that a proclamation of war was necessary, after a truce, is entitled to little attention.

of hostages.

CLXVI. Hostages are persons pledged as a security for the faith of a state. They are of remote antiquity (b).

They cannot be demanded without just cause. If persons with whom the foreign state will be satisfied, voluntarily offer themselves, they must be appointed: but if not, others may be compelled to act, if chosen fairly by lot. If the foreign state peremptorily demand particular persons, they are bound to act. Vassals are not compellable to serve as hostages, unless they be subjects. Every power having a right to make treaties, may give and take hostages.

They have no right to escape, or to oppose with violence the state to which they are sent. Their nation cannot receive them back, against good faith. Their corporeal liberty, comfort, relief, safety, and indemnity, so far as is consistent with their security, should be consulted. They should never be treated as slaves, and should be regarded as prisoners of war

(a) See Liv. lib. iv. c. 30.

(b) See Herodot. vi. sec. 73.

only upon the breach of the public engagement. If the treaty for which they are pledged be not performed, they become perpetual prisoners.

They are not liable to be punished, or to suffer death as enemies (*a*), if the treaty be violated; for they have not so engaged. But they are liable to suffer death for their own unnatural acts calling for that punishment. In such cases, however, is is commendably generous to surrender them for trial, to the other state, upon receiving another hostage, and upon the trial of the guilty person being stipulated for.

They should be protected, in every reasonable manner, by their state. Their nation is not bound to submit to threatened grievous demands, out of consideration for the safety of their lives. They are entitled to return, when the promise for which they are pledged, is performed (*b*), or has naturally expired. Their obligation ceases with their lives; and ransom is therefore claimable on account of those only who remain living.

A hostage becoming a sovereign, should be exchanged for one equal to his former rank. A mere hostage for a prisoner, is entitled to release upon the prisoner's death. The death of such a hostage does not discharge the prisoner. A hostage dying, another cannot be required in his place, unless it have been so stipulated. A substitute for a hostage is freed by the death of the latter. Hostages of noble birth should be very respectfully treated.

Although, in case of the violation of the compact,

(*a*) See contra:—Ward, ii. p. 291.

(*b*) See contra:—Grotius, lib. iii. c. 20.—Wolff, Jus. Gent. sec. 503.

they were always indulgently treated, the imprisonment of them would scarcely be attended with any effect, yet Humanity recoils at the infliction upon them of any suffering not peremptorily-essential to the public interest. It was a most cruel act, for the emperor Henry the Sixth, in the year 1197, to deprive the sicialian hostages of their eyes (*a*), because their country did not continue to submit to his dominion.

Of safeguards.

CLXVII. Safeguards are animate and inanimate:—

Animate safeguards are soldiers, placed by a commander in chief, to protect a part of his enemy's property. The merciful character of their office renders them inviolable, notwithstanding the conquest of the army of which they formed a part.

Inanimate safeguards are letters of protection, issued by the general in chief.

*Of passports,
and safe-con-
ducts.*

CLXVIII. Passports are licences to pass through a friendly country. They are in use in most of the european countries. Safe-conducts are permissions for such persons to pass in time of war, as would otherwise be liable to molestation. The granting of both depends upon the sovereign will. They are not transferable. They include the baggage of the party. A prince is bound to take care of their full performance; and to cause reparation if they be broken. To violate the protection which they afford, is an outrage more than unworthy of the elevated situations of monarchs. It is painful to record the fact that John Huss, and Jerome of Prague, were condemned by the general council,

(*a*) Heiss. Hist. de l'Allemagne, 1. 112.

and burnt, although the emperor Sigismund had granted to them a safe-conduct, and was, in honor, obliged to protect them during their return to their native land—a violation of faith, which was bitterly avenged by fourteen victories, gained by Zisca, the Hussite general, over the imperial troops. The persons bearing passports, and safe-conducts, are excused for breaking the terms annexed to them, only by absolute necessity.

Foreigners, not having passports or safe-conducts, if customary in the country, may be detained. But it is highly illiberal, if not unjust, to refuse a passport to an innocent ally.

CLXIX. States are to be judged by the same rules, so far as they can be, as individuals are in a natural condition. Of the balance of power.

The law of nature does not permit a man to rob another of his property, or to deprive him of limbs, or liberty, because he is richer, or stronger, or more to be feared as to body or mind, than himself. Neither are political bodies justified in attacking others, upon similar grounds.

Paley is therefore, with other writers, wrong in stating the preservation of the mere balance of power to be a sufficient cause for war. It is as unjust (a) to contend with a nation, on account of its superior strength or riches, as it would be to attack an individual, in a state of nature, on such a ground. The

(a) See contra:—Von Martens, book iv. c. 1, sec. 3.—Paley, ii. book 6, c. 12, sec. 1.—Ward, i. p. 147.—Leckie on the Bal. of Pow.

existence of an universal monarchy is at the least a highly-improbable event; and the very proof of its accomplishability might necessarily demonstrate its usefulness. I am astonished to find so learned a public professor as Von Martens, declare that a nation may, by force of arms, oppose the aggrandisement of another, "without the least regard to its lawfulness." This is singular language from the pen of an authorised teacher of public law.

But although measures of violence are unjustifiable, when exercised simply to reduce the strength of a foreign state, it is often a matter of prudence to disfavor, by honest means, the increase of a power likely to become formidable to us. The annihilation of a third country by a foreign nation, has often, by removing the political counterpoise, a dangerous tendency.

Of punishing
for general in-
ternational
injustice.

CLXX. It is lawful for nations to resist and punish for such wicked infringements upon international law, as set at defiance the inviolable rights of nations, and endanger the combatants, as a part of the common lot of mankind. Communities are sentient beings, and are presumed capable of judging when other powers, by violent injustice, place their rights in danger.

Of standing
armies.

CLXXI. The high discipline, soldier-like regularity, useful experience, and habituation to danger, which attach to a standing army, give it advantages which cannot attend raw and undisciplined troops, who are liable at least to be thrown into disorder. It is therefore unsafe for a nation not to retain a standing army, if standing troops be kept up in foreign

countries. Its size must depend upon the degree of force and military tact to be apprehended from its adversaries. The system also increases the stock of rational comfort at home, by permitting the other subjects to perform their domestic occupations without interruption.

It cannot, however, be controverted, that standing armies may greatly endanger the public liberty, unless the soldiers be associated as much as possible with the other classes of the state. Every thing separating the military profession from the civic interests, should be carefully avoided.

CLXXII. It is for the people to judge when the constitution is so decidedly violated by the sovereign, as to justify his deposition. Other states have no right to interfere, excepting at the request, and in aid of the party wronged. Of rebellion.

It is highly culpable for a foreign state to assist rebellious subjects, in taking up arms against their legitimate sovereign.

CLXXIII. The conqueror may compel the obedience of the conquered. A conquered people should be treated justly, and mercifully. The greatest valor, most desperate defence, or most determined resistance, is no ground for injuring the captured. No brave man will punish another for doing his duty. Of the conquered.

For a nation which boasts of liberty, to restrain freedom, is most inconsistent.

It is base to conquer nations for the purpose of giving them away. A great principle of conquest should be, to improve the condition of the people conquer-

ed. But it sometimes occurs, that the very conquered overcome their conquerors, by having their laws and manners adopted by them. Such was the case of ancient Greece, which gave rise to the elegant expression of Horace(*a*):

“ Græcia capta, ferum victorem cepit.”

The tartarian subjection of China is another instance of the fact.

If it be stipulated, upon the conquest or surrender of a country, that the ancient laws and prerogatives shall remain in force, it is by no means to be inferred that the people of the conquering power are to be subject to the legal institutions of the vanquished. With regard to the inhabitants themselves, some alterations must necessarily take place; for the political face of things is changed—a new sovereign takes possession of the territory—he therefore administers the laws by his own judges. In him, then, is vested the high appellatory jurisdiction; and all the laws which are to be in existence, must have reference to, and be consistent with, his royal authority.

Of emigration.

CLXXIV. Subjects may be restrained from emigrating to a foreign land, whether mechanics or not; but a liberal use should be made of this right. Workmen will seldom leave their country, in dangerous numbers, if they receive proper encouragement at home. The extent to which that restraint shall be exercised, depends upon the national constitution.

Of the recall of subjects.

CLXXV. The sovereign power, by virtue of its ge-

(*a*) Ep. II. 1. 156.

neral right of controlling the acts of the community, for the public advantage, may recall to the country absent subjects, whose presence he considers necessary to the common safety.

CLXXVI. Slaves are generally regarded by the law, Of slaves. as personal property, unless otherwise provided for by it. Their political condition is not at all changed by their baptism.

Manumission can exist only in cases in which the proprietor intends to give freedom to the slave. The slave is entitled to liberation, only after manumission, or by the act of the law. An intermediate state of liberation, such as slaves enjoy whilst in England, does not release them from slavery (a) upon their return to the colony, or to any other place. It has no other effect than to suspend their absolute state of servitude. The various laws of places are not to be set aside, in consequence of their non-conformity to the constitution of a particular country.

The christian religion has greatly tended to the abolition of slavery.

CLXXVII. A nation, in the administration of its judicial proceedings, should treat the laws of other countries with respect. The sentences of the courts of different nations are generally, although not universally, acknowledged among them. Such judgments as have been *prima facie* the definitive results of just deliberation, in a court of competent jurisdiction, should be treated as conclusive. Official copies of records should be received in foreign countries, as evidences of debts, Of the international administration of justice.

(a) See Lord Stowell's judgm. as to the slave "Grace."

without revising the causes and grounds of action, such debts being clearly ascertained by the proper authority of the country, which is a moral agent. Courts should be tenacious of interfering in disputes between aliens, unless with the consent of the sovereign or his public representative. Suits at law, in which foreigners are concerned, either as plaintiffs or defendants, must be according to the practice of the state in which such suits are instituted. The judiciary power should be promptly and justly exerted, according to the national laws, as well in the causes of foreigners, as in those of the subjects. For the clear denial of justice to strangers is a sufficient cause for war, on the part of their state.

Sovereign powers sometimes ordain particular laws for foreigners, in the place of those which apply to their own subjects; and sometimes they generously concede to aliens the privilege of trying disputes among themselves, by the consuls and laws of their own nation.

Although civil laws cannot strictly be said to have full operation out of the country for the regulation of which they are enacted, yet they exercise an essential influence over the acts of the subjects, even although resident in a foreign land, so far as such influence does not interfere with the jurisdiction of the sovereign.

Contracts are to be considered according to the laws of the place where they are made. Unnatural agreements are regarded as invalid in all countries. Alien-enemies cannot prosecute an appeal; but the king's officers may, as to their property, to which the sovereign has, by hostilities, become entitled (*a*). Alien-

(*a*) See Dods. Adm. Rep. p. 214.

enemies employed in trading, under the protection of a licence, may sue for their wages. Courts should not favor objections made, against good conscience, to the demands of men, merely because they are, or are presumed to be, alien-enemies. It is the duty of the sovereign power to protect foreign governments, from malevolent attacks of the press, by its subjects: for, whilst the tranquillity of the nation itself is carefully consulted, the peace and honor of other friendly nations should not be forgotten. International law regards, with a natural sympathy, the subject of marriages between people of different countries—it tolerates, with becoming forbearance, the peculiar views of various nations as to the matrimonial connexion. A foreign marriage, valid in one country, is so, generally-speaking, all over the world; but it does not, *e converso*, hold good that a marriage, invalid in one place, is so in all places. And the rule is liable to the exceptions ordained by the civil laws, from motives of expediency. Marriage in a country raises a forum there, even where aliens are concerned, for the trial of the validity of the marriage, and for the punishment of the parties, if improperly united (*a*). The ecclesiastical courts of a country have cognizance of the marriage of its subjects, wherever solemnized.

The observance of national allegiance, whether the subject be at home or abroad, is a matter of importance never to be lost sight of, in the administration of justice. In order to constitute domicile, there must be an intention to stay. A man cannot voluntarily

(*a*) See Gayll. lib. ii.—Sanchez. de Matrim.—Hagg. Consist. Rep. ii. p. 409.—Donellus.

throw off his allegiance, by removing to another country. A subject, resident in a neutral state, may trade with an enemy, in all articles not contraband; but if he deal with him in other things, it is contrary to his allegiance. But for commercial purposes, such a subject may be considered as a foreigner. To commit an act of hostility upon an ally of the state, is a punishable offence. To join an enemy in battle, against the forces of one's country, is treason. To assist a national foe with arms, is a highly-culpable act. The importation of goods, for the use of the king, or his royal family, and the conveyance of public stores, are not acts of trade of a confiscable nature. The domestic judges should determine the causes of foreigners, with undeviating impartiality; and their decisions, unless characterised by wilful injustice, should be submitted to, by the other state. The legal institutions of a conquered place exist, until altered or modified by the conquering power, as to the persons conquered, excepting so far as alteration is necessarily made either by the natural results of conquest, or the enactment of the victor. They do not however bind the conquerors, unless it be so stipulated. A state which boasts of liberty, and there are few which do not, should not restrain freedom.

The fact of a ship being at sea, whether in time of peace or war, without papers on board, is evidence of her suspicious character, unless the fact be fairly accounted for. The doctrine, that such a circumstance is infallible evidence of her confiscability, is unsound. Her papers may have been lost, burnt, stolen, or mislaid. It is not the custom of every country to carry such papers; although it is a wise precaution. But here I speak in-

ternationally. Every nation may, as to its own subjects, render the want of ship's papers an incurable defect.

The execution or non-execution of the criminal and civil sentences of other countries, depends upon the pleasure of the sovereign. It is reasonable, in some cases, for him to forward the completion of foreign sentences; but it can scarcely be maintained, as a general rule, that a monarch is imperatively bound to be the minister, or assistant of the foreign power, in all its judicial processes. In such cases as murder, and forcible robbery, it is reasonable to aid the execution of the sentence which subjects the criminal to punishment. But with respect to other offences, the sovereign power may well judge of the propriety of interference, by the rules which it establishes for the trial and punishment of its own subjects. The asylum to which the foreign subject has resorted for personal shelter, should not be readily violated, for the sake of inflicting punishment for trifling or questionable offences.

CLXXVIII. Nobility of conduct is essential to national prosperity. All the public acts should be characterised by unblemished faith. Commynes (a) records an occurrence of a singular description, which forcibly shows the distrust formerly entertained by monarchs for each other. Louis XI., of France, was desirous, upon the invasion of his territory by our Edward IV., to negotiate with his enemy, in order to avoid the evils of war. A regal conference was therefore agreed upon. A

Of international faith.

(a) L. iv. c. 9, 10.

strong iron-barrier of trellis-work was fixed across the bridge, over the river Somme, with openings sufficient only to admit men's arms. Four of the king of England's train were admitted to the french side, and an equal number of gentlemen of the french monarch were allowed to pass through, to the english side. These eight persons were employed to see that no unfair attack or preparation was made, during the interview. Thus did the two greatest men in Europe confer on a settlement of reciprocal amity. Such precautions, in the present day, would be considered barbarous. When Buonaparte and Alexander met upon the raft at Tilsit, it was not considered necessary that a lion's cage should be placed upon it, for the purpose of mutual safety.

Of the glory,
dignity, and
happiness of
nations.

CLXXIX. As universal jurisprudence has always the attainment of general happiness in view, this work may well be concluded with a consideration of the duty of the country to consult its welfare. It requires no argument to show the existence of that duty. The national prosperity is of a compound character. Its virtues may render it, in a great measure, happy; but its internal wealth is necessary to complete the public felicity. It therefore becomes nations, with foresight and prudence, to keep a steady eye upon the means of their glory, happiness, and dignity.

The happiness of a country depends upon the increase of population; the morality, industry, courage, wealth, rational education, and patriotism of the people; the goodness of their constitution, and laws; and upon their just and liberal conduct to other nations; the fertility of the land; the ease with which food is

generally obtained; the internal conveniences adapted to the purposes of trade and mutual communication; the rewards given to men whose services are useful to the public; and lastly, upon the encouragement given to science and literature.

As those mechanical machines are the best, which effect the greatest ends by the simplest means, so are those political systems the most desirable, which, being the least intricate, produce the most efficient results.

A long war and heavy taxation are great evils. The bad administration of finance is highly destructive to the happiness of a nation. It leads to continual abuses; and sometimes eventually to revolution. A very high degree of luxury, pomp, and prodigality, in the court, is a certain forerunner of the fall of the country. The moderate simplicity of it is evidence of the national strength.

The population of the country is an object of lively interest, in the mind of every good and skilful legislator. The social nature of mankind, and the necessary dependence of men upon each other, demonstrate the accession of human happiness, produced by the increase of numbers. The reproductive and multiplicative nature of the physical world shows, in the provisions of Providence, the ends which He has had in view. The encouragement of marriage, even amongst the poorest orders of society, is the best mode of increasing the population—of continually adding to the state new members, capable and ready to forward the interests of political fidelity. Any law which binds men to a particular form of marriage hostile to their consciences, is a legal prohibition of marriage.

Valor is a virtue to be cherished by every friend of

his country, as a source of civil security, which cannot be too dearly prized. It leads to the cultivation of personal and political strength—to strict discipline—to frugal economy—and to steady patience. By the innurement of courage and fortitude, men are readily induced to undertake great hazards, for private and public benefit. The Swiss owe their national greatness, in a great measure, to their constant and distinguished bravery, and to its natural concomitant in a civilised state—uncompromising justice. Instances of extreme bravery are not without their uses. They excite an influence advantageous to the public. Example is in this case, as in all others, more powerful than precept. The nation should erect monuments to the memory of those departed heroes who have fallen for her in the field of glory. Amongst such heroes, surely those common soldiers and sailors are not to be forgotten, whose bravery has been eminently useful to their country.

The members of the state should unite in the vigorous protection of the common interests. A country torn about by intestine violence, is highly vulnerable. Saladin acquired the kingdom of Palestine, in consequence of the divisions between the nobility and the other branches of the state.

The encouragement of virtue, and the suppression of vice, will not fail to engross the attention of the good men who guide the public helm. In the enforcement of morality, our duty to God is the foremost consideration, at least with relation to those who believe in his divine existence; and there are few indeed who doubt it. It is a dangerous, although a fashionable doctrine, that morality and piety are always distinct. But it will be

most unfortunate for the state, if superstition supply the place of sound and rational devotion. "*Nec vero superstitione tollenda, religione tollitur,*" was an observation worthy of Cicero.

The state of nature has been lauded as a happy state. In what does this happiness consist? in nakedness, in cannibalism, in savage contests, or in more barbarous tortures—in ungoverned feeling, or promiscuous concubinage? The savage is scarcely superior to the brute. He possesses the attributes of man without their developement.

The strict administration of justice is essential to the prosperity of the country. The wisdom of the laws will therefore be gravely consulted by the prince and ministers of the nation. They will be rendered as publicly-known, clear, concise, economical, equitable, and speedy, as their nature and objects will admit. But the wisest laws will lose much of their force and influence, if the dispensers of them—the judges, be not incorrupt and independent.

The public faith should be preserved with dignified decorum. The offices of humanity must be respected and performed. Goodwill will be gained, by a generous exercise of itself. Some monarchs have hoped to render their memories immortal, by acts of the grossest barbarity. Montezuma caused 50,000 men to be slaughtered in pretended honor of his coronation, thus violating the oath of political justice, at the very moment at which it was administered to him.

Patriotism is evinced, not by a mere love of country, but by an ennobled and ennobling attraction of foreigners to the soil of our nativity, through the mildest influences of enlarged beneficence. A country which really

loves liberty, will not restrain the freedom of other nations. The monarch, who in procuring prosperity for his own people, infringes as little as possible upon the liberty and happiness of other nations, is indeed worthy of the warmest applause. The national riches ought to be increased by prudent measures, and expended with frugal caution. The interests of agriculture or commerce should be promoted, according to their connexion with the public advantage.

Loyalty is best inculcated by the example of the virtues of truly-royal sovereignty.

The freedom of discussion should be permitted, as extending the views of the subjects in general; and eliciting the discovery of pure truth. Genius cannot exist whilst she is in fetters. The liberal toleration of all religionists, will, under salutary limitations, add to the general felicity; and confer lasting honor upon the sovereign who dispenses it. Liberty is essential to the national welfare. A country may be blessed with a delightful climate, fertile lands, romantic scenery, beautiful women, and mines of gold. But what are these advantages without good laws, and a free constitution? The subjects can have no persuasion of security and protection from the laws of the country, in which there is little or no political liberty.

Literature and science are highly deserving of the patronage and munificence of the national governors. The generous support and protection of men of letters, by the mussulman emperors of Hindûstan, is remembered with gratitude by all the friends of science. As an illustrious example to succeeding sovereigns, they caused literary talent to be the source of wealth and power. The persons of learned men

were as free as their pens. They were permitted to express their opinions with a more than european licence. Frederick, as a man, gained more honor by his studious retirement, than by his far-famed battles. Catharine the Second in a great measure redeemed her extravagance, by her constant and zealous promotion of literature. George the Fourth, by the happiest and most generous promotion of peaceful arts, has rendered his sway more truly illustrious, than that of a Darius or a Xerxes. His liberality of sentiment, his firmness of action, and his patronage of literature and science, are sources rich with public prosperity. Happy indeed is Britain, to be blessed with such a monarch! Long may Britons be the subjects of such a king! Truth, above all things, because for the sake of all things, should be cultivated by the nation. It is in the nature of Truth to advance for a time by slow but sure degrees, but when she arrives at a certain point of success, her advances are not by steps, but by strides. Learned men, who devote their time, with unabated assiduity, to the interests of their country, should be most liberally rewarded. Rational education is necessary to the public happiness, as teaching the means of moral and physical improvement. The polite arts will ever be cherished by a good sovereign—cherished by bestowing upon the devotees of learning and science, pecuniary and honorable rewards, proportioned to their public services.

A love of liberty should stimulate the subjects to deeds of patriotism, and public virtue. The patriot must expect often to meet with disappointment. Conscientious goodness is frequently the only reward which he

enjoys in this life. To every persecuted man the end of Socrates is consolatory and interesting. He was unjustly condemned at the instigation of Melitus, for the pretended offence of disseminating doctrines which for forty years he had daily controverted, and of opposing that happiness which he warmly promoted. The people, blown about by the storm of political dissension, sacrificed their best friend to their undiscerning fury. But scarcely had Socrates bid a final adieu to the Athenian groves, than the decree of condemnation was repealed, Melitus was put to death as an expiatory sacrifice, and Lysippus received a public commission to execute a statue of brass in honor of the martyr to philosophy and truth.

It has been contended that warm climates have a highly injurious influence upon the political character of man, and that the inhabitants of them are the least disposed to bravery, patriotism, and genius. But we cannot forget the glory of Homer and Aristides, Plato and Demosthenes, Socrates and Aristotle. Rome produced her Gracchus and her Virgil, Scipio and Cicero, Regulus and Brutus.

Amidst the varieties of political government, the happiness of the subjects ought always to be remembered. The comparatively-dignified nature of man—the exalted sentiments of which his heart is susceptible—and the capabilities of enjoyment with which his supreme Creator has blessed him—should always protect him from oppression, and guard him against indiscretion. His breast should ever be warmed with the glow of virtuous independence. Enervating refinements should not debase his life. In fine, his mo-

ral goodness should be studiously consulted, and he should be treated as a being whose physical and intellectual health are above all price.

It is by the exercise of these generous sentiments—it is by the cultivation of these endearing virtues—it is by the protection of these vital interests—that the social strength will increase and continue. Arduous duty to draw, from such valuable sources, the stream of general felicity!

The glory of the nation must, after its internal happiness, greatly depend upon the justice and faith which it observes towards other states. Calm and dignified moderation, brilliant and unfettered justice, noble and discriminating liberality, should be observed, in all its international acts. The same qualities which ennoble individuals in a condition of nature, also endear countries to each other, exciting national respect, attachment, and gratitude. The majesty of the state, concentrated in the person of its prince, should be unsullied in its reputation. The sovereign may then, with a truly dignified decision, insist upon the inviolability of the national name and glory. Then may he indeed with honor hurl the awful thunders of sovereignty against the violators of those claims which all good nations respect. Then will he with justice, receive not only from his affectionate people, but from the civilised world at large, applause infinitely more valuable than the gold and purple of courts. Then will he enjoy the serene delight of a peaceful conscience. Then will his memory be honored, as recalling to the minds of men, an example of sovereign greatness. Above all—then will he, at the bar of the Eternal Di-

vinity, receive the most incomparable approval, and the infinite reward, of the **KING OF ALL KINGS.**

But the most loyal men will not forget that the character of a nation is composed of the characters of its individual members. Let us recollect, that upon us, subjects, chiefly rests the glory of our country. Let us remember, that individual excellencies constitute, in the sum, national greatness. Therefore let us endeavor to excel each other in private and public virtue.

FINIS.

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ERRATA.

Page 38, instead of 19th and 20th lines, *read*:

" 4. To our wives, or husbands (*f*).

5. To our parents.

(*f*) See Gen. ii. 24."

68, l. 19, *dele* " But "

94, l. 12, *after* " us " *insert* " (*a*). " And in note, *for* " 132 " *read* " 131. "

96, *for* " p. 98, " *read* " 96. "

117, l. 7, *after* " his " *read* " royal "

135, l. 11, *for* " the world " *read* " countries. "

205, l. 23, *dele* " one of "

247, l. 4, *for* " eighth " *read* " tenth "

252, l. 22, *after* " doge " *read* " nobles and councils "

272, l. 24, *before* " been " *read* " have "

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